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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

STEVE LOREN SCOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. CV _____
CR 02-938-R

**MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE BY A
PERSON IN FEDERAL CUSTODY
(FILED PROTECTIVELY) AND
NOTICE OF FILING OF SECOND
OR SUCCESSIVE PETITION IN
THE NINTH CIRCUIT**

**FILED PURSUANT TO JOHNSON V.
UNITED STATES**

Petitioner, by and through his counsel of record Brianna Fuller Mircheff, hereby files the attached motion to vacate his sentence. This petition is filed protectively, in order to ensure compliance with the one-year statute of limitations. Petitioner further notifies the Court that he has filed an application for leave to file the instant second or successive motion to vacate his sentence in the Ninth Circuit, Case No. 16-71507. Petitioner asks that this Court hold this petition in abeyance until such time as the Ninth Circuit grants his application. Petitioner will notify the Court if his application is granted.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: May 18, 2016

By /s/ Brianna Fuller Mircheff

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**UNITED STATES DISTRICT COURT
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WESTERN DIVISION**

STEVE LOREN SCOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. CV _____

Case No. CR 02-0938-R

**MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE UNDER
28 U.S.C. § 2255**

Petitioner Steve Loren Scott, through undersigned counsel, hereby respectfully
moves this Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C.
§ 2255.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: May 18, 2016

By /s/ Brianna Fuller Mircheff
BRIANNA FULLER MIRCHEFF
Deputy Federal Public Defender

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- Exhibit D: Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal
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- Exhibit E: Order Denying Defendant's Motion to Vacate, Set Aside or Correct
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- Exhibit F: Transcript, Closing Argument (October 4, 2006)

**MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE
UNDER 28 U.S.C. § 2255**

I. INTRODUCTION

Petitioner Steve Loren Scott, by and through his attorney, Deputy Federal Public Defender Brianna Fuller Mircheff, hereby submits this motion to vacate, set aside, or correct his sentence, based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e), is void for vagueness. *Johnson*'s reasoning applies equally to the residual clause in the career offender guideline, U.S.S.G. § 4B1.2(a)(2). Therefore, in light of *Johnson*, Mr. Scott's sentence under U.S.S.G. § 4B1.1 was imposed in violation of the Constitution or the laws of the United States. Petitioner therefore requests that this Court grant this motion, vacate his current sentence, and re-sentence him.

II. PROCEDURAL HISTORY

A. Conviction and Sentencing

Mr. Scott was convicted, following a jury trial, of Racketeer Influenced and Corrupt Organizations conspiracy ("RICO conspiracy"), in violation of 18 U.S.C. § 1961(d) (Count 2). (Ex. A, Judgment and Commitment Order, January 9, 2007, CR 4354.)¹ On January 8, 2007, he was sentenced to 220 months imprisonment. (Ex. A, Judgment and Commitment Order, January 9, 2007, CR 4354.)

Relevant to this application, Count 2 of the First Superseding Indictment charged Mr. Scott with violating Section 1962(d) by being a "member[]" and associate[] of a criminal organization whose members and associates engaged in, among other things, murder, attempted murder, conspiracy to commit murder, extortion, robbery, and

¹ Unless otherwise indicated, all citations to "CR" refer to the clerk's record in CR 02-0938-R, Mr. Scott's underlying criminal case in this Court. Counsel does not yet have all the relevant documents relating to this case, but will supplement the exhibits as they become available and prove relevant to Mr. Scott's claims.

1 narcotics trafficking.” (Ex. B, First Superseding Indictment, August 25, 2005, CR
2 2295, at 1.) The jury found Mr. Scott guilty of Count 2, the RICO conspiracy charge.
3 Of all of the predicate acts charged, the jury found that the government had proved only
4 that Mr. Scott had agreed that the offenses of murder and conspiracy to commit murder
5 would be committed. (PSR ¶ 3.)

6 The Second Revised Presentence Report, disclosed on December 20, 2006,
7 (“PSR”) concluded that Mr. Scott was a career offender under U.S.S.G. § 4B1.1
8 because he had at least two prior adult felony convictions for crimes of violence: (1)
9 armed robbery in violation of Oregon state law, for which he received a sentence of 20
10 years; (2) armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d), for which he
11 received a sentence of 240 months; and (3) assault with a dangerous weapon with intent
12 to do bodily harm, in violation of 18 U.S.C. § 113(a)(3), for which he received a
13 sentence of 120 months. (PSR ¶¶ 65, 77, 88, 95.) The PSR concluded that these
14 convictions and Mr. Scott’s underlying RICO conspiracy conviction “me[et] the
15 definition of ‘crime of violence’ as defined in U.S.S.G. § 4B1.2(a).” (PSR ¶ 65.)

16 The career offender finding affected Petitioner’s sentence. The PSR found that
17 his non-career-offender offense level was 31, but that his career-offender offense level
18 was 32. (PSR ¶¶ 61, 65-67.) In total, then, the career offender designation had the
19 effect of changing Petitioner’s guideline range from 188-235 months to 210-240
20 months.

21 Petitioner disputed the PSR’s determination of career offender status, on the
22 ground that his RICO conspiracy conviction under 18 U.S.C. § 1962(d) was not a
23 qualifying “crime of violence.” (Ex. C, Defendant Scott’s Position Re: Sentencing, at
24 12-14.) The probation officer rejected this argument and declined to amend the PSR
25 with respect to its career offender determination. (PSR ¶ 65.) At the sentencing
26 hearing held on January 8, 2007, “[t]he district court rejected [Mr.] Scott’s objections to
27 the PSR, noting that they merely reargued the merits of the case[,] adopted the PSR[,]”
28 and imposed a term of 220 months imprisonment. (*See United States v. Scott*, 642 F.3d

1 791, 795-96, 801 (9th Cir. 2011) (*per curiam*) (“[T]he district court merely adopted the
2 PSR’s ‘crime of violence’ determination.”); Ex. A, Judgment and Commitment Order,
3 January 9, 2007, CR 4354.)

4 **B. Direct Appeal**

5 Petitioner appealed his conviction and sentence. Relevant to this petition,
6 Petitioner challenged the district court’s determination that his RICO conspiracy
7 conviction under 18 U.S.C. § 1962(d) qualified as a “crime of violence” for career
8 offender purposes. *See Scott*, 642 F.3d at 800-01. On June 8, 2011, the Ninth Circuit
9 rejected Petitioner’s challenges to his conviction and sentence, including his career
10 offender claim. *See generally Scott*, 642 F.3d 791. With respect to Petitioner’s career
11 offender claim, the Ninth Circuit found “it was proper” for the district court to “look[]
12 behind the RICO conviction and consider[] the underlying predicate offenses in
13 determining whether Scott’s offense qualified as a crime of violence.” *See Scott*, 642
14 F.3d at 801. The Court found that the underlying conduct, based on the jury’s verdict,
15 was conspiracy to murder, which was a crime of violence. *Id.* The Court cited the
16 career-offender guideline’s commentary note 1, i.e., that crime of violence definition
17 includes “conspiracy to murder.” *Id.*

18 Petitioner sought a writ of certiorari from the United States Supreme Court,
19 which was denied on October 11, 2011. *Scott v. United States*, 132 S. Ct. 440 (2011).

20 **C. Section 2255 Motion**

21 On October 11, 2012, Petitioner filed *pro se* a Section 2255 motion in the Central
22 District of California. (Ex. D, Motion to Vacate, Set Aside or Correct Sentence by a
23 Person in Federal Custody 28 U.S.C. § 2255, October 11, 2012, CR 6978.) The motion
24 raised five grounds: (1) “[t]he predicates upon which the verdict rests do not satisfy
25 RICO’s statutory definition of ‘racketeering activity’ under 18 U.S.C. § 1961(a)(A)”
26 (*id.* at 6); (2) “[t]he three state murder conspiracy acts upon which the verdict depends
27 were but a single conspiracy to murder . . . therefore, the evidence was insufficient to
28 prove that the petitioner agreed that a ‘pattern’ of racketeering would take place” (*id.* at

18); (3) “[Defendant] is actually innocent of the crime of RICO Conspiracy” (*id.* at 26); (4) “[t]rial counsel’s failure to move under [R]ule 29 for a judgment of acquittal deprived the petitioner of his right to effective assistance of counsel in violation of the Sixth Amendment and excuses any procedural default[,] forfeiture[,] or waiver” (*id.* at 28); and (5) Appellate counsel’s failure to notice or even argue the issues presented [in the 2255 motion] . . . resulted in denial of [Petitioner’s] rights under the Fifth and Sixth Amendments to effective assistance of counsel on appeal, thus excusing any procedural forfeiture or waiver.” (*Id.* at 29; Ex. E, Order Denying Defendant’s Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, June 5, 2013, CR 7009, 1-2.) The district court denied Petitioner’s Section 2255 motion on June 5, 2013. (Ex. E, Order Denying Defendant’s Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, June 5, 2013, CR 7009, 5.) The Ninth Circuit denied a certificate of appealability on December 10, 2014. (Order, December 10, 2014, CA 13-56483, Dkt. 10.)

D. Second or Successive 2255

This 2255 Motion is filed in conjunction with Petitioner’s application for leave to file a second or successive 2255 petition in the district court.

III. ARGUMENT

Under 28 U.S.C. § 2255(a), a defendant is entitled to a resentencing when his original sentence was imposed “in violation of the Constitution or laws of the United States.” Petitioner is entitled to relief on these grounds because under *Johnson v. United States*, 135 S. Ct. 2251 (2015), he is now serving illegal and unconstitutional career offender sentence.

Section 4B1.1 of the Sentencing Guidelines provides for enhanced guidelines ranges where (1) the defendant is 18 years or older at the time of the instant offense, (2) the instant offense is a felony “crime of violence” or “controlled substance offense,” and (3) the defendant has at least two prior felony convictions of either a “crime of

1 violence” or a “controlled substance offense.” See USSG § 4B1.1(a). As set out in the
2 career offender guideline, the term “crime of violence” is defined as:

3 [A]ny offense under federal or state law, punishable by imprisonment for a term
4 exceeding one year, that—

5 (1) has as an element the use, attempted use, or threatened
6 use of physical force against the person of another, or

7 (2) is burglary of a dwelling, arson, or extortion, involves use of
8 explosives, or otherwise involves conduct that presents a serious
9 potential risk of physical injury to another.

10 U.S.S.G. § 4B1.2(a). As used in this brief, subsection (1) is called the “force clause”;
11 subsection (2)’s list of offenses is called the “enumerated offenses clause,” and the
12 remainder of subsection (2) is called the “residual clause.” Mr. Scott’s career offender
13 designation was based on the finding that his underlying instant offense, RICO
14 conspiracy, was a crime of violence, and that he had at least two prior crimes of
15 violence. After *Johnson*, however, neither the instant offense nor the prior offenses
16 qualify as crimes of violence. As such, Mr. Scott’s sentence should be vacated, and he
17 should be resentenced under the non-career-offender guideline.

18 **A. RICO Conspiracy Is Not A Crime of Violence, After *Johnson*.**

19 A RICO conspiracy offense based on conspiracy to commit murder was only
20 ever a crime of violence under the residual clause and under commentary tied to the
21 residual clause – as highlighted by the Ninth Circuit’s decision in this case. Because
22 *Johnson* rendered unconstitutional the residual clause of the career offender guideline,
23 and with it, the commentary that solely interpreted the residual clause, Mr. Scott’s
24 career-offender sentence must be vacated and he must be resentenced.

25 **1. RICO Conspiracy Is Not A Crime of Violence Under the Residual**
26 **Clause.**

27 Prior to *Johnson*, the Ninth Circuit had long held that RICO conspiracy was a
28 crime of violence under the residual clause whenever the predicate racketeering activity

1 the defendant agreed should be committed was a crime of violence. *E.g., United States*
2 *v. Scott*, 642 F.3d 791, 801 (9th Cir. 2011) (citing to *United States v. Juvenile Male*,
3 118 F.3d 1344, 1350 (9th Cir. 1997), and affirming district court’s conduct in
4 “look[ing] behind the RICO [conspiracy] conviction and consider[ing] the underlying
5 predicate offenses in determining whether [the defendant’s RICO conspiracy] offense
6 qualified as a crime of violence”); *Juvenile Male*, 118 F.3d at 1350. In *Juvenile Male*,
7 for example, the court reasoned that ““a conspiracy to commit an act of violence is an
8 act involving a “substantial risk” of violence.”” 118 F.3d at 1350 (quoting *United States*
9 *v. Mendez*, 992 F.2d 1488, 1490 (9th Cir. 1993) and citing *United States v.*
10 *Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985) and *United States v. Doe*, 49 F.3d 859,
11 866 (2d Cir. 1995)); *see also Doe*, 49 F.3d at 866 (concluding that RICO conspiracy to
12 commit robbery is a crime of violence because “the nature of the conspiracy’s
13 substantive objective [] provide[s] an indication as to whether the conspiracy creates
14 the substantial risk that physical force against the person or property of another may be
15 used in the offense”). The *Juvenile Male* court concluded that the RICO conspiracy
16 charge in that case satisfied the identical residual clause of the Juvenile Delinquency
17 Act² because the predicate activity of Hobbs Act robbery was itself a crime of violence.
18 *Id.* at 1350.

19 In *Johnson*, the Supreme Court declared the residual clause of the ACCA to be
20 “unconstitutionally vague” because the “indeterminacy of the wide-ranging inquiry
21 required by the residual clause both denies fair notice to defendants and invites
22 arbitrary enforcement by judges.” *Johnson*, 135 S. Ct. at 2557. Thus, the Supreme
23 Court concluded, “[i]ncreasing a defendant’s sentence under the clause denies due
24 process of law.” *Id.* The Supreme Court held the residual clause “vague in all its
25

26 ² “Crime of violence” for purposes of the Juvenile Delinquency Act is defined by
27 18 U.S.C. § 16, *see United States v. Juvenile Female*, 566 F.3d 943, 947 (9th Cir.
28 2009). which, as noted *infra*, is worded and interpreted identically to the definition of
“crime of violence” set forth in Section 924(c).

1 applications,” *id.* at 2561, and overruled its contrary decisions in *James v. United*
2 *States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 131 S. Ct. 2267 (2011).
3 *Johnson*, 135 S. Ct. at 2562-63.

4 The holding in *Johnson* invalidating the residual clause of the ACCA applies
5 equally to the career offender residual clause. Section 4B1.2(a)(2)’s residual clause
6 tracks the ACCA’s residual clause verbatim. *Compare* U.S.S.G. § 4B1.2(a)(2) (“or
7 otherwise involves conduct that presents a serious potential risk of physical injury to
8 another”); *with* 18 U.S.C. § 924(e)(2)(B)(ii) (“or otherwise involves conduct that
9 presents a serious potential risk of physical injury to another”). Accordingly, the Ninth
10 Circuit interprets the clauses identically and applies ACCA residual clause precedent in
11 career offender cases. *See, e.g., United States v. Terrell*, 593 F.3d 1084, 1087 n.1 (9th
12 Cir. 2010) (internal citations omitted) (stating that the ACCA’s “violent felony”
13 definition is “nearly identical” to Section 4B1.2 and that the decision’s ACCA analysis
14 “applies equally to § 4B1.2”); *United States v. Crews*, 621 F.3d 849, 852 n.4 (9th Cir.
15 2010) (“In the past we have made no distinction between the terms ‘violent felony’ and
16 ‘crime of violence’ for purposes of interpreting the residual clause . . .”). *Johnson*’s
17 discussion of the legal uncertainty and infirmity inherent in an ACCA residual-clause
18 analysis applies with equal force to Section 4B1.2(a)(2), as the government itself has
19 conceded. *United States v. Benavides*, 617 Fed. App’x 790 (9th Cir. 2015) (vacating
20 and remanding for resentencing in light of government’s concession that *Johnson*
21 applies to the similarly worded residual clause in the guidelines).

22 **2. Because the Residual Clause Is Invalid, RICO Conspiracy Cannot**
23 **Be A Crime of Violence Under the Commentary to the Crime of**
24 **Violence Definition.**

25 The application notes contained in the commentary to section 4B1.2 include a
26 separate list of offenses that the application notes state qualify as crimes of violence.
27 Among those offenses is “conspiracy” and “murder.” See U.S.S.G. § 4B1.2 cmt. n.1.
28 This commentary seems to be the basis of the Ninth Circuit’s decision in this case. *See*

1 *Scott*, 642 F.3d at 801. With the excision of the residual clause from the career
2 offender provision, however, the offenses listed only in the commentary to the
3 guideline – and particularly conspiracy -- are no longer of any effect either, because
4 they only possibly interpreted the residual clause.

5 The Sentencing Reform Act of 1984 created the Sentencing Commission and
6 authorized it to create “guidelines . . . for use of a sentencing court in determining the
7 sentence to be imposed in a criminal case.” 28 U.S.C. § 994(a)(1). Those guidelines are
8 submitted to Congress in advance, *id.* § 994(p), making the Sentencing Commission
9 “fully accountable to Congress.” *See Mistretta v. United States*, 488 U.S. 361, 393-94
10 (1989) (upholding the Sentencing Commission against a separation of powers challenge
11 on this ground).

12 Commentary, on the other hand, does not receive the same treatment as the
13 guidelines. The Sentencing Reform Act does not explicitly authorize the creation of
14 commentary. 28 U.S.C. § 994(a) (authorizing “guidelines” and “policy statements”);
15 *see also Stinson v. United States*, 508 U.S. 36, 41 (1993). Nor does the Sentencing
16 Reform Act require that commentary be submitted to Congress for approval. *See* 28
17 U.S.C. § 994(p) (requiring only that amendments to guidelines be submitted to
18 Congress); *Stinson*, 508 U.S. at 46 (commentary “is not reviewed by Congress”). And
19 the Sentencing Commission itself has relegated commentary to a secondary,
20 interpretative role. *See* U.S.S.G. § 1B1.7 (explaining that the purpose of the
21 commentary is to “interpret [a] guideline or explain how it is to be applied”); *United*
22 *States v. Anderson*, 942 F.2d 606, 611 (9th Cir. 1991), *abrogated on other grounds by*
23 *Stinson v. United States*, 508 U.S. 36 (1993) (noting the Sentencing Commission’s
24 belief that commentary “is an aid to correct interpretation of the guidelines, not a
25 guideline itself or on a par with the guidelines themselves”). Where commentary assists
26 and amplifies the text of the guideline – and where the text of the guideline “will bear
27 the construction” the commentary offers – the commentary’s interpretation of the
28 guideline is binding. *Stinson*, 508 U.S. at 46. But where commentary runs afoul of the

1 Constitution or a federal statute or where it is “plainly erroneous or inconsistent” with
2 the guideline it interprets, it is the text of the guideline, not the commentary, that must
3 control. *Id.* at 45-47; *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (stating
4 if there is a potential conflict between the text and the commentary, the text controls).

5 Because commentary is solely an interpretative aid, it “does not have
6 freestanding definitional power” and only has force insofar as it interprets or explains a
7 guideline’s text. *United States v. Leshen*, 453 Fed. App’x 408, 413-15 (4th Cir. 2011)
8 (unpublished) (finding that prior state sex offenses did not qualify as crimes of
9 violence, despite government argument that offenses fell within the commentary);
10 accord *United States v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015) (“[The government
11 skips past the text of § 4B1.2 to focus on its commentary,” but “it is the text, of course,
12 that takes precedence.”). It follows that, if a portion of a guideline is excised, the
13 commentary that interpreted that portion of the guideline must go as well. Vestigial
14 commentary without a textual hook must be deemed “inconsistent” with the text under
15 *Stinson*, because its only “functional purpose” was to “assist in the interpretation and
16 application” of a rule no longer exists. *Stinson*, 508 U.S. at 45.

17 The only question that remains, then, is whether the term “conspiracy” in the
18 commentary interpreted the residual clause or whether it interpreted some portion of the
19 definition that remains intact. This Court’s precedents have always tied conspiracy to
20 the residual clause. *See, e.g., Juvenile Male*, 118 F.3d at 1350 (“a conspiracy to
21 commit an act of violence is an act involving a “substantial risk” of violence.”
22 (quoting *United States v. Mendez*, 992 F.2d 1488, 1490 (9th Cir. 1993) and citing
23 *United States v. Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985) and *United States v.*
24 *Doe*, 49 F.3d 859, 866 (2d Cir. 1995)); *see also Doe*, 49 F.3d at 866 (concluding that
25 RICO conspiracy to commit robbery is a crime of violence because “the nature of the
26 conspiracy’s substantive objective [] provide[s] an indication as to whether the
27 conspiracy creates the substantial risk that physical force against the person or property
28 of another may be used in the offense”); *see also James v. United States*, 550 U.S. 192,

1 206 (2007) (holding that attempt was appropriately included in the commentary
2 enumerated offenses, “based on the Commission’s review of empirical sentencing data
3 [which] presumably reflects an assessment that attempt crimes often pose a similar risk
4 of injury as completed offenses”). It cannot be said, then, that the commentary included
5 conspiracy in order to “assist in the interpretation of” the force clause—the inclusion
6 of those offenses is quite inconsistent with the text of the force clause.

7 With the residual clause excised from the guideline, the commentary no longer
8 serves to interpret or amplify any provision of the remaining text, but, instead, is a
9 contrary and plainly erroneous interpretation of what remains. Once the residual clause
10 is gone, the commentary offenses—and especially conspiracy offenses—must go as
11 well.

12 The First Circuit has already reached a similar conclusion post-*Johnson*, holding
13 that the list of enumerated offenses contained in the guidelines commentary was
14 interpreting only the residual clause, and that post-*Johnson*, such commentary is no
15 longer of any effect. As the Court stated, “once shorn of the residual clause § 4B1.2(a)
16 sets forth a limited universe of specific offenses that qualify as a ‘crime of violence.’
17 There is simply no mechanism or textual hook in the Guideline that allows us to import
18 offenses not specifically listed therein into 4B1.2(a)’s definition of ‘crime of
19 violence.’” *See United States v. Soto-Rivera*, 811 F.3d 53, 60 (1st Cir. 2016). This
20 holding is in line with the interpretation many Circuits had given to the career-offender
21 commentary even before *Johnson*. *See Shell*, 789 F.3d at 345 (finding that a state
22 statute that did not meet the requirements of the *text* of § 4B1.2 could not be saved on
23 the grounds that it might fall under one of the commentary’s list of offenses, noting that
24 the commentary serves “only to amplify that definition, and any inconsistency between
25 the two [must be] resolved in favor of the text”) (citing *Stinson*, 508 U.S. at 43); *United*
26 *States v. Armijo*, 651 F.3d 1226, 1234-37 (10th Cir. 2011) (rejecting the government’s
27 argument that Colorado manslaughter qualifies as a crime of violence simply because it
28 is listed in the commentary and need not qualify under the definitions set out in the text;

1 “[t]o read application note 1 as encompassing non-intentional crimes would render it
2 utterly inconsistent with the language of § 4B1.2(a)”); *see also United States v. Serna*,
3 309 F.3d 859, 862 & n.6 (5th Cir. 2002) (possession of a sawed-off shotgun, while
4 listed in the commentary, must satisfy one of the definitions in the text). The Ninth
5 Circuit should do so as well.

6 **3. RICO Conspiracy Is Not a Crime of Violence under the**
7 **Force Clause.**

8 Mr. Scott’s career offender designation cannot be salvaged under the force clause
9 because his conviction for RICO conspiracy does not have “as an element the use,
10 attempted use, or threatened use of physical force against the person of another.”

11 To determine whether a predicate offense qualifies as a “crime of violence”
12 under the force clause, this Court must employ the categorical approach outlined in
13 *Taylor v. United States*, 495 U.S. 575, 600 (1990). *See United States v. Simmons*, 782
14 F.3d 510, 513 (9th Cir. 2015); *see also Descamps v. United States*, 133 S. Ct. 2276,
15 2283 (2013) (applying categorical approach in an Armed Career Criminal Act (ACCA)
16 case). Under *Taylor*, only the statutory definitions —i.e., the elements—of the
17 predicate crime are relevant to determine whether the conduct criminalized by the
18 statute, including the most innocent conduct, qualifies as a “crime of violence.” 495
19 U.S. at 599-601.

20 Determination of whether a criminal offense is categorically a crime of violence
21 is done by “assessing whether the ‘full range of conduct covered by [the statute] falls
22 within the meaning of that term.’” *United States v. Grajeda*, 581 F.3d 1186, 1189 (9th
23 Cir. 2009) (citation omitted). To do this, courts must look “at the least egregious end of
24 [the . . . statute’s] range of conduct.” *United States v. Baza-Martinez*, 464 F.3d 1010,
25 1014 (9th Cir. 2006) (quoting *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th
26 Cir. 2006)). In other words, under the categorical approach, a prior offense can only
27 qualify as a “crime of violence” if all of the criminal conduct covered by a statute—
28

1 “including the most innocent conduct” —matches or is narrower than the “crime of
2 violence” definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir.
3 2012). If the statute punishes some conduct that would qualify as a crime of violence
4 and some conduct that would not, it does not categorically constitute a crime of
5 violence. *Grajeda*, 581 F.3d at 1189. In a “narrow range of cases,” if the statute is
6 divisible as to a material element, then the court may apply the modified categorical
7 approach by looking beyond the statutory elements to certain documents of conviction
8 to determine whether the defendant’s conviction necessarily involved facts
9 corresponding to the generic federal offense. *Descamps*, 133 S. Ct. at 2283-84.

10 To be a categorical match to the terms of the force clause in the career offender
11 guideline, a state statute must require, among other things, proof of violent, physical
12 force. “Physical force” has the meaning given to it by the Supreme Court’s 2004
13 decision in *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004), and its 2010 decision in
14 *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*). In *Leocal*, the
15 Supreme Court held that the phrase “physical force” in that section requires a “violent,
16 active crime[.]” 543 U.S. at 11. The *Johnson I* Court expanded on that definition,
17 holding that the phrase “physical force” in ACCA’s almost-identical force clause
18 defining “violent felony” means “*violent* force—that is, force capable of causing
19 physical pain or injury to another person.” *Johnson I*, 559 U.S. at 140.

20 Mr. Scott’s RICO conspiracy conviction categorically is not a crime of violence
21 under the force clause because RICO conspiracy does not have as an element the use or
22 threatened use of any physical force. In a prosecution for a substantive RICO offense,
23 the government must prove “(1) the conduct (2) of an enterprise [engaged in, or the
24 activities of which affect, interstate or foreign commerce] (3) through a pattern of
25 racketeering activity.” *Salinas v. United States*, 522 U.S. 52, 62 (1997). A “pattern of
26 racketeering activity” “requires at least two acts of ‘racketeering activity,’” which, in
27 turn, is defined to include “murder, kidnapping, gambling, arson, robbery, bribery,
28 extortion, dealing in obscene matter, or dealing in a controlled substance or listed

1 chemical . . . , which is chargeable under State law and punishable by imprisonment for
2 more than one year.” 18 U.S.C. § 1961(1)(A), (5). In a RICO conspiracy prosecution,
3 however, the government must only prove that a defendant “knew about and agreed to
4 facilitate the scheme” of racketeering activity. *Salinas*, 522 U.S. at 66. “There is no
5 requirement of some overt act or specific act” in a RICO conspiracy case. *Id.* at 63.
6 Thus, “[t]he RICO conspiracy provision [] is even more comprehensive than the
7 general conspiracy offense in [18 U.S.C.] § 371.” *Id.*

8 Indeed, the government argued just that in this case. In closing the prosecutor
9 argued:

10 We don’t have to prove that this defendant ever actually did anything. We don’t
11 have to prove that anyone in the Aryan Brotherhood ever actually did anything.
12 What we have to prove is that this defendant agreed with other members of the
13 conspiracy that a racketeering organization would be formed. We have to prove
14 that this defendant agreed that he would be associated with this future enterprise.
15 And we have to prove that this defendant agreed that at some point in the future,
16 some co-conspirator, some member of the conspiracy, would commit two
17 racketeering acts.

18 Ex. F, at 24-25.

19 Because the RICO conspiracy statute only requires a showing that the defendant
20 agreed to violate the RICO statute, and does not require the government to demonstrate
21 that the defendant or anyone else involved in the conspiracy committed an overt act in
22 furtherance of the conspiracy *or took any action at all*, it does not have as an element
23 the use, attempted use, or threatened use of force, let alone the use, attempted use, or
24 threatened use of violent, physical force. For that reason, it cannot be a crime of
25 violence under the force clause. *Cf. United States v. Luong*, Case No. CR 99-00433,
26 2016 WL 1588495, *2 (E.D. Cal. Apr. 20, 2016) (dismissing Section 924(c) counts
27 post-*Johnson*, reasoning that Hobbs Act conspiracy is not a crime of violence under the
28 force clause because it only requires an agreement between two or more persons, and

1 does not require that the persons actually commit the crime; therefore it does not
2 require the use, attempted use, or threatened use of physical force); *United States v.*
3 *Edmundson*, __ F. Supp. 3d __, 2015 WL 9582736 (D. Md. Dec. 30, 2015) (same);
4 *United States v. Chandler*, 743 F.3d 648 (9th Cir. 2014) (implying that Nevada
5 conspiracy to commit robbery does not satisfy the force clause and is not an
6 enumerated offense under the ACCA; holding that it qualified under the residual
7 clause), *vacated and remanded in light of Johnson*, 135 S. Ct. 2926 (2015), by 619 F.
8 App'x 641 (9th Cir. 2015); *United States v. White*, 571 F.3d 365, 368-69 (4th Cir.
9 2009) (holding that North Carolina conspiracy statute, which lacks an overt act
10 element, does not satisfy the force clause of the ACCA because it does not have as an
11 element the use, attempted use, or threatened use of force), *abrogated on other grounds*
12 *by Johnson*, 135 S. Ct. 2551 (2015); *United States v. Gore*, 636 F.3d 728, 731 (5th Cir.
13 2011) (same, with respect to Texas conspiracy to commit robbery statute).

14 In other words, regardless of what the underlying racketeering activity *is*, a RICO
15 conspiracy charge does not have, as an element, the use, attempted use, or threatened
16 use of force.

17 **B. Oregon Armed Robbery Is Not a Crime of Violence Under *Johnson*.**

18 Nor is Oregon armed robbery is not a crime of violence under the career offender
19 definition. Previous Ninth Circuit precedent had held that various state robbery statutes
20 were violent crimes under the residual clause. *See United States v. Prince*, 772 F.3d
21 1173, 1176 (9th Cir. 2014) (finding that second degree robbery is a violent felony under
22 the residual clause of the Armed Career Criminal Act, because it “certainly” is the kind
23 of crime that presents a serious potential risk of physical injury to another);³ *see also*
24 *United States v. McDougherty*, 920 F.2d 569, 574 & n.3 (9th Cir. 1990) (“Clearly then,
25

26 ³ *United States v. Terrell*, 593 F.3d 1084, 1087 n.1 (9th Cir. 2010) (internal
27 citations omitted) (stating that the ACCA’s “violent felony” definition is “nearly
28 identical” to Section 4B1.2 and that the decision’s ACCA analysis “applies equally to §
4B1.2”).

1 robbery as defined in California falls under 18 U.S.C. 16(b) as a felony that ‘by its
2 nature, involves a substantial risk’ that physical force may be used”; interpreting an
3 earlier version of the career-offender residual clause, but stating that the “result . . .
4 would be no different” under the present version of the guideline). However, as set out
5 above, *supra* Section III.A.1, *Johnson* had the effect of rendering unconstitutionally
6 vague the identical language in the career offender crime of violence definition. As
7 such, these cases are no longer good law.

8 **1. Oregon Armed Robbery Is Not A Crime of Violence under the**
9 **Force Clause.**

10 Nor is Oregon “armed robbery” a crime of violence under the force clause. It
11 appears, based on the opinion from the Oregon Court of Appeals, that Mr. Scott’s
12 conviction for armed robbery was based on Oregon First Degree Robbery. *State v.*
13 *Scott*, 59 Or. App. 220 (Ct. App. Ore. 1982). Oregon First Degree Robbery has all of
14 the elements of Oregon Third Degree Robbery, with the addition of one of three
15 elements: (a) is armed with a deadly weapon; (b) uses or attempts to use a dangerous
16 weapon; or (c) causes or attempts to cause serious physical injury to any person. Or.
17 Rev. Stat. § 164.415.

18 In a district court in Oregon, Oregon third degree robbery has been found not to
19 be a violent felony because “the level of force required to sustain a conviction does not
20 rise to the level of ‘violent force’ required by Johnson I.” *United States v. Dunlap*, 2016
21 WL 591757 at *5; *accord Sloan v. Ives*, 3:15-cv-00342-MO (D. Or. Apr. 8, 2016). In
22 *Dunlap*, the Court cited state cases interpreting the force element of third-degree
23 robbery to require only “minimal force,” including purse snatchings that did not
24 involve enough force to cause pain or injury. 2016 WL 591757, at *5 (citing *State v.*
25 *Johnson*, 215 Or. App. 1, 168 P.3d 312 (2007)).

26 The circumstances that transform third-degree robbery into first-degree robbery
27 do not render the latter offense a qualifying predicate because they do not necessarily
28 entail a threat to use violent force. The most innocuous of the three options – which is

1 necessarily the focus of the categorical analysis⁴ – is a person who “is armed with” a
2 dangerous weapon. Or. Rev. Stat. § 164.415. To sustain a conviction for Oregon First
3 Degree robbery, “[t]he person committing the crime need not actually use the deadly
4 weapon, much less make any representation about it.” *State v. Zimmerman*, 12 P.3d 996
5 (Ct. App. Or. 2000).

6 Under similar facts, the Ninth Circuit has found that Massachusetts armed
7 robbery was not a violent felony after *Johnson* for purposes of the ACCA. In *Parnell*,
8 the Ninth Circuit held that Massachusetts armed robbery is not a violent felony under
9 the ACCA because merely possessing a dangerous weapon does not communicate an
10 intent to use the weapon: “The mere fact an individual is armed, however, does not
11 mean he or she has used the weapon, or threatened to use it, in any way.” 2016 WL
12 1633167 at *3. The Court pointed out that the Massachusetts statute did not “require a
13 weapon be used or displayed, or even that the victim be aware of it.” *Id.* at *3; *accord*
14 *United States v. Werle*, 815 F.3d 614, 621-22 (9th Cir. 2016) (a defendant having a
15 weapon accessible and readily available for use for offensive or defensive purposes
16 does not “necessarily mean that he or she has used the weapon in any way”).

17 Like the Massachusetts statute at issue in *Parnell*, Oregon Armed Robbery is not
18 a crime of violence under the force clause. And, with the residual clause and the
19 commentary offense of robbery excised, Oregon First Degree Robbery cannot be a
20 crime of violence under the force clause.

21 **2. The Inclusion of “Robbery” Among the Offenses Enumerated in**
22 **the Commentary to the Guideline Does Not Serve to Make**
23 **Petitioner a Career Offender**

24 Finally, just as the commentary’s inclusion of “conspiracy” falls under *Johnson*,
25 because that term interpreted the residual clause, so too does the commentary offense
26

27 ⁴ See *State v. Edwards*, 251 Or. App. 18, 23 (Ct. App. 2012) (finding that the
28 three subsections of first degree robbery “define a single crime”)

1 robbery. Of all of the substantive offenses listed in the commentary, robbery has
2 perhaps the strongest tie to the residual clause. The Ninth Circuit’s generic definition
3 of robbery is tied to the risk of harm to the person, not to any element of force. *See*
4 *Becerril-Lopez*, 541 F.3d at 891 (defining generic robbery as “aggravated larceny,
5 containing at least the elements of misappropriation of property under circumstances
6 *involving immediate danger to the person*”) (emphasis added); *see also Leshen*, 453
7 Fed. App’x. at 415 (noting that the generic term “robbery” in the commentary
8 interpreted the residual clause of the career offender guideline). Indeed, Ninth Circuit
9 precedents have generally tied state robbery statutes to the residual clause of various
10 crime-of-violence definitions. *United States v. Prince*, 772 F.3d 1173, 1176 (9th Cir.
11 2014) (finding that California second degree robbery is a violent felony under the
12 residual clause of the Armed Career Criminal Act, because it “certainly” is the kind of
13 crime that presents a serious potential risk of physical injury to another); *United States*
14 *v. Chandler*, 743 F.3d 648, 652-55 (9th Cir. 2014) (Nevada conspiracy to commit
15 robbery is a violent felony under the residual clause), *remanded pursuant to Johnson*,
16 743 F.3d 648 (9th Cir. 2015); *see also United States v. McDougherty*, 920 F.2d 569,
17 574 & n.3 (9th Cir. 1990) (“Clearly then, robbery as defined in California falls under 18
18 U.S.C. 16(b) as a felony that ‘by its nature, involves a substantial risk’ that physical
19 force may be used”; interpreting an earlier version of the career-offender residual
20 clause, but stating that the “result . . . would be no different” under the present version
21 of the guideline).

22 On the flip side, it is equally clear that the majority of Ninth Circuit state robbery
23 statutes are not crimes of violence under the force clause. *See Dixon*, 805 F.3d at 1197
24 (California robbery does not satisfy the force clause); *United States v. Alvarado-*
25 *Pineda*, 774 F.3d 1198 (9th Cir. 2014) (suggesting, without deciding, that Washington
26 robbery might not be a crime of violence under the similarly worded force clause of 18
27 U.S.C. § 16(a), because the statute required “any force or threat, no matter how
28

slight”); *United States v. Dunlap*, ___ F. Supp. 3d ___, 2016 WL 591757, at *4-6 (D. Or. 2016) (Oregon robbery is not a crime of violence under the force clause).

Against this background, it is clear that the commentary’s reference to robbery could only have interpreted the residual clause, i.e., as an example of a type of crime that entails “a serious potential risk of physical injury to another.” With the residual clause excised from the guideline, the commentary no longer serves to interpret or amplify any provision of the remaining text, but, instead, is a contrary and plainly erroneous interpretation of what remains. Once the residual clause is gone, the commentary offenses—and especially robbery—must go as well.

California robbery is not a crime of violence under any provision of the text of Section 4B1.2, and commentary cannot be used to expand the definition of crime of violence beyond what the text will bear. As such, it cannot serve as a basis to hold that petitioner’s conviction is a crime of violence.⁵

C. Federal Armed Bank Robbery Is Not A Crime of Violence under *Johnson*.

Armed bank robbery is not a crime of violence after *Johnson* either. A person violates the armed bank robbery statute if he, “by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another” the property of a bank and in so doing “assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device.” 18 U.S.C. § 2113(a), (d). Thus, the elements of the crime are

- (1) the defendant took money belonging to a bank, credit union, or savings and loan,
- (2) by using force and violence or intimidation,
- (3) the deposits

⁵ It appears that Oregon First Degree Robbery may not be a crime of violence even if robbery remains an enumerated offense for career offender purposes. However, because the commentary has been effectively excised from the career offender guideline, this Court need not reach that question.

1 of the institution were insured by the Federal Deposit Insurance
2 Corporation (“FDIC”), and (4) in committing the offense, the defendant
3 assaulted any person, or put in danger the life of any person by the use of a
4 dangerous weapon.

5 *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000). In *Wright*, the Ninth
6 Circuit held that armed bank robbery was a crime of violence under the almost-
7 identical force clause of Section 924(c)(3)(A).⁶ *Id.* The decision’s analysis was limited,
8 reasoning only “[a]rmed bank robbery qualifies as a crime of violence because one of
9 the elements of the offense is a taking ‘by force and violence, or by intimidation.’” *Id.*
10 (citing 18 U.S.C. § 2113(a)).

11 There is much water under the bridge since *Wright* was decided, however, and
12 intervening Supreme Court and en banc Ninth Circuit decisions have undermined
13 *Wright’s* reasoning that armed bank robbery was a crime of violence. Specifically, the
14 Supreme Court issued a series of cases redefining the boundaries of the force clause,
15 such that armed bank robbery no longer satisfies that clause because it does not require
16 an *intentional* threat of force, nor does it require a threat of *violent* force. *Johnson*,
17 moreover, removed the alternative grounds on which bank robbery could have been
18 deemed a crime of violence; that armed bank robbery qualified as a career offender
19 predicate crime of violence under the residual clause or the commentary to the
20 guideline. After *Johnson*, Mr. Scott’s armed bank robbery conviction no longer serves
21 as a career offender prio.

22
23
24
25
26 ⁶ Section 924(c)(3)(A)’s force clause differs from the career offender guideline’s
27 force clause only in that Section 924(c)(3)(A) includes the use, attempted use, or
28 threatened use of physical force against both a person “*or property of another.*” 18
U.S.C. § 924(c)(3)(A).

1 **1. Armed Bank Robbery Does Not Require the *Intentional* Use**
2 **or Threatened Use of Force.**

3 The first reason armed bank robbery is categorically overbroad and cannot
4 support a finding that a defendant is a career offender under the force clause is because
5 the statute contains no requirement that a defendant have possessed any *mens rea* with
6 respect to either his or her use of force and violence or intimidation, let alone that the
7 defendant used force and violence or intimidation intentionally.

8 In *Carter v. United States*, 530 U.S. 255, 268 (2000), the Supreme Court held
9 that bank robbery is a general intent crime. That is, the defendant must have
10 “possessed knowledge with respect to the *actus reus* of the crime.” *Id.* As an example
11 of a hypothetical defendant who should not be punished under the statute, the *Carter*
12 Court wrote that “Section 2113(a) certainly should not be interpreted to apply to the
13 hypothetical person who engages in forceful taking of money while sleepwalking[.]”
14 *Id.* at 269. Following *Carter*, courts have held that the *actus reus* of bank robbery is the
15 taking of money and therefore, the statute requires a showing only that the defendant
16 “knew he was physically taking money.” *See United States v. Yockel*, 320 F.3d 818,
17 823 (8th Cir. 2003). Whether the defendant took money via an intentional use of force
18 and violence or intimidation is “irrelevant.” *Id.*; *see also United States v. Kelley*, 412
19 F.3d 1240, 1244 (11th Cir. 2005) (“[A] defendant can be convicted under section
20 2113(a) even if he did not intend for an act to be intimidating.”). Thus, in *Yockel*, the
21 Eighth Circuit affirmed the district court’s exclusion at trial of any evidence regarding
22 whether the defendant intended to use force and violence or intimidation. 320 F.3d at
23 823.

24 *Yockel* and *Kelley* are in accord with this Circuit’s longstanding, pre-*Carter*
25 case law which also holds that, at least in cases involving intimidation, whether a
26 defendant “specifically intended to intimidate . . . is irrelevant.” *United States v.*
27 *Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). This holding stems from the court’s
28 conclusion that the definition of taking, or attempting to take “‘by intimidation’ means

1 willfully to take, or attempt to take, in such a way that would put an ordinary,
2 reasonable person in fear of bodily harm.” *United States v. Alsop*, 479 F.2d 65, 67 n.4
3 (9th Cir. 1973). Because this definition focuses on the effect of the accused’s actions
4 on the victim, “[t]he determination of whether there has been an intimidation should be
5 guided by an objective test focusing on the accused’s actions,” *not* his or her intent.
6 *Id.*; *see also United States v. Woodrup*, 86 F.3d 359, 363 (4th Cir. 1996) (“The
7 intimidation element of § 2113(a) is satisfied if ‘an ordinary person in the [victim’s]
8 position reasonably could infer a threat of bodily harm from the defendant’s acts,’
9 whether or not the defendant actually intended the intimidation.”). It makes no
10 difference in the analysis that a defendant in an armed bank robbery case uses a
11 dangerous weapon in the course of committing the offense: whether he intentionally
12 used the weapon is simply not an element of the crime. In short, a defendant may be
13 convicted of armed bank robbery even though he did not intend to put another in fear,
14 but merely did some act involving a dangerous weapon that would put an ordinary,
15 reasonable person in fear of bodily harm. *See United States v. Martinez-Jimenez*, 864
16 F.2d 664, 666-67 (9th Cir. 1989) (Section 2113(d) “focuses on the harms created, not
17 the manner of creating the harm.”).

18 As a statute must require the intentional use of force in order to match the
19 definition of “use of force” in the career offender guideline force clause following
20 *Leocal* and *Fernandez-Ruiz*, and because Section 2113(a), (d) requires no such
21 showing, *Wright’s* conclusion that bank robbery is a crime of violence under the force
22 clause is no longer good law. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir.
23 2003) (en banc) (“[T]he issues decided by the higher court need not be identical in
24 order to be controlling. Rather, the relevant court of last resort must have undercut the
25 theory or reasoning underlying the prior circuit precedent in such a way that the cases
26 are clearly irreconcilable.”). Following *Leocal* and *Fernandez-Ruiz*, federal armed
27 bank robbery cannot be a crime of violence under the force clause.

1 **2. Armed Bank Robbery Does Not Require the Use or**
2 **Threatened Use of *Violent* Force.**

3 Moreover, armed bank robbery does not require the use or threat of *violent*
4 physical force. With respect to the use-of-force-and-violence-or-intimidation element,
5 nothing in the term “intimidation” requires a threat of *violent* physical force.
6 Intimidation is satisfied even where there is no explicit threat at all, let alone the threat
7 of violent force. For example, a simple demand for money from a bank teller will
8 support a bank robbery conviction. *See United States v. Hopkins*, 703 F.2d 1102, 1103
9 (9th Cir. 1983) (“Although the evidence showed that Hopkins spoke calmly, made no
10 threats, and was clearly unarmed, we have previously held that ‘express threats of
11 bodily harm, threatening body motions, or the physical possibility of concealed
12 weapon[s]’ are not required for a conviction for bank robbery by intimidation.”
13 (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir.1980))). But, as the
14 Ninth Circuit recently held, an “uncommunicated willingness or readiness to use
15 [physical] force . . . is not a threat to do so.” *United States v. Parnell*, __ F.3d __, 2016
16 WL 1633167, *3 (9th Cir. April 12, 2016). A threat of physical force, as would satisfy
17 the force clause “requires some outward expression or indication of an intention to
18 inflict pain, harm or punishment.” *Id.* Federal bank robbery has no such requirement.

19 Further, the Ninth Circuit’s definition of intimidation does not require a showing
20 of the use or threatened use of violent physical force because placing a person “in fear
21 of bodily harm” does not necessarily require the use or threatened use of violent
22 physical force. On this matter, the Fourth Circuit has “recognized that, to constitute a
23 predicate crime of violence justifying a sentencing enhancement under the Guidelines,
24 a [predicate] offense must constitute a use or threatened use of violent force, not simply
25 result in physical injury or death.” *Torres-Miguel*, 701 F.3d at 169; *Accord United*
26 *States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010); *Chrzanoski v. Ashcroft*,
27 327 F.3d 188, 194 (2d Cir. 2003) (“there is ‘a difference between causation of an injury
28 and in injury’s causation by the “use of physical force””); *United States v. Perez-*

1 *Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005); *Whyte v. Lynch*, 807 F.3d 463, 469-72
2 (1st Cir. 2015). For example, a defendant could commit bank robbery through
3 intimidation by threatening to poison the teller, but this would not constitute the
4 threatened use of violent physical force, even though it would result in the teller being
5 in fear of bodily harm. *Cf. Torres-Miguel*, 701 F.3d at 168-69 (holding that
6 California’s criminal threats statute does not constitute a crime of violence because “a
7 defendant can violate statutes like § 422(a) by threatening to poison another, which
8 involves no use or threatened use of force.”); *Matter of Guzman-Polanco*, 26 I. & N.
9 Dec. 713 (BIA 2016) (“Caesar’s death at the hands of Brutus and his fellow
10 conspirators was undoubtedly violent; the death of Hamlet’s father at the hands of his
11 brother, Claudius, by poison, was not.”) (quoting *Rummel v. Estelle*, 445 U.S. 263, 282
12 n.27 (1980)).

13 With respect to the deadly weapon element of Section 2113(d), a defendant may
14 be found guilty of armed bank robbery without engaging in conduct that involves the
15 use or threat of violent physical force. For example, a defendant’s mere display of or
16 reference to possession of a gun, without making any threat to use the gun, is sufficient
17 to sustain a conviction under section 2113(d). *See United States v. Jones*, 84 F.3d
18 1206, 1211 (9th Cir. 1996); *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986);
19 *Martinez-Jimenez*, 864 F.2d at 666.

20 Moreover, a defendant may be convicted of armed bank robbery even though he
21 displays or refers only to an unloaded or inoperable firearm, or even a toy resembling a
22 firearm. *See McLaughlin*, 476 U.S. 16, 17-18 (1986) (unloaded gun); *Martinez-*
23 *Jimenez*, 864 F.2d at 666-67 (inoperable gun, toy gun); *see also United States v. Boyd*,
24 924 F.2d 945, 947-48 (9th Cir. 1991) (road flare qualifies as a dangerous weapon). This
25 conduct does not involve the use or threatened use of violent force. In *McLaughlin*, the
26 Supreme Court reasoned that an unloaded gun qualified as a dangerous weapon within
27 the meaning of Section 2113(d) because “a gun is an article that is typically and
28 characteristically dangerous . . . and the law reasonably may presume that such an

1 article is always dangerous even though it may not be armed at a particular time or
2 place” and because “the display of a gun instills fear in the average citizen; as a
3 consequence, it creates an immediate danger that a violent response will ensue.” 476
4 U.S. at 17-18. In other words, the *McLaughlin* court concluded that a robber’s use of
5 an unloaded gun could be considered to put in danger another person’s life not because
6 the robber could actually use the gun or because the gun actually posed a threat of
7 violence against anyone in the bank but merely because it was a reasonable position for
8 the law to take that all guns are dangerous, since as a general matter guns often are
9 dangerous. The Court also concluded that a robber’s use of an unloaded gun could put
10 in danger another person’s life not because the robber actually used or threatened to use
11 the gun in a violent, active way but only because others who saw the gun might
12 *themselves* react in a violent way. In the words of the *Martinez-Jimenez* court, “[t]he
13 *McLaughlin* opinion recognizes that the dangerousness of a device used in a bank
14 robbery is not simply a function of its potential to injure people directly. Its
15 dangerousness results from the greater burdens that it imposes upon victims and law
16 enforcement officers.” 864 F.3d at 666. As these cases make clear, defendants can be,
17 and indeed many have been, convicted of armed bank robbery without using or
18 threatening to use violent force.

19 For these reasons, federal armed bank robbery does not qualify as a crime of
20 violence under the force clause of Section 4B1.2. The contrary holding in *Wright* is
21 clearly irreconcilable with *Johnson I* and *Leocal*. See *Miller*, 335 F.3d at 899-900.

22 **3. Following *Johnson*, Armed Bank Robbery Does Not Qualify as an**
23 **Enumerated Offense under the Residual Clause or the**
24 **Commentary of Section 4B1.2**

25 Until *Johnson*, defendants like Petitioner had little motivation to challenge
26 *Wright*’s force clause holding, knowing that their armed bank robbery predicate would
27 likely still be deemed a crime of violence under the residual clause or the term
28 “robbery” in the Commentary. Indeed, prior to *Johnson*, the Ninth Circuit had held that

1 various state robbery crimes were crimes of violence under the residual clause of
2 several crime-of-violence definitions. *See, e.g., United States v. Prince*, 772 F.3d 1173,
3 1176 (9th Cir. 2014) (finding that California second degree robbery is a violent felony
4 under the residual clause of the Armed Career Criminal Act, because it “certainly” is
5 the kind of crime that presents a serious potential risk of physical injury to another);
6 *United States v. Chandler*, 743 F.3d 648, 652-55 (9th Cir. 2014) (Nevada conspiracy to
7 commit robbery is a violent felony under the residual clause), *remanded pursuant to*
8 *Johnson*, 743 F.3d 648 (9th Cir. 2015); *see also United States v. McDougherty*, 920
9 F.2d 569, 574 & n.3 (9th Cir. 1990) (“Clearly then, robbery as defined in California
10 falls under 18 U.S.C. 16(b) as a felony that ‘by its nature, involves a substantial risk’
11 that physical force may be used”; interpreting an earlier version of the career-offender
12 residual clause, but stating that the “result . . . would be no different” under the present
13 version of the guideline). And the court cited to the commentary’s inclusion of the
14 word “robbery” in *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990), to support
15 its conclusion that Section 2113(a) was a crime of violence. *Johnson*, however,
16 removed these alternative grounds of justifying Petitioner’s sentence: *Johnson* caused
17 the residual clause of the career offender guideline to fall and, in doing so, *Johnson*
18 necessarily took with it the enumerated offenses in the commentary that interpreted the
19 residual clause. Thus, for the reasons set out *supra* Section III.A.1 and III.B.3, neither
20 the residual clause nor the commentary offense of “robbery” provides an alternative
21 basis for finding that Mr. Scott’s armed bank robbery conviction is a crime of violence.

22 **D. Mr. Scott’s Assault Conviction Was Never a Crime of Violence for**
23 **Career Offender Purposes**

24 Although the PSR lists *three* prior convictions, Mr. Scott only ever had two
25 qualifying prior offenses, because his assault conviction does not meet the terms of
26 U.S.S.G. § 4B1.2.

27 In order to serve as a “prior felony conviction” for career offender purposes, a
28 conviction must, indeed, be *prior*. The Guidelines define a prior felony conviction to

1 mean that “the defendant committed the instant offense of conviction subsequent to
2 sustaining at least two felony convictions of either a crime of violence or a controlled
3 substance offense. . . .” U.S.S.G. § 4B1.2(c). The guideline further states that the date a
4 defendant sustains a conviction “shall be the date that the guilt of the defendant has
5 been established, whether by guilty plea, trial, or plea of *no lo contendere*.” *Id.*

6 Under this definition, Mr. Scott sustained his assault conviction on September
7 25, 2002, the date on which the jury found him guilty of that offense. (PSR ¶ 95.) But
8 the offense Mr. Scott committed, as charged in the Indictment, was a conspiracy that
9 ended, according to the government, July 25, 2002. (Ex. B, at 8.) According to the PSR,
10 the last of the relevant overt acts committed by Mr. Scott was in 1999. (PSR ¶ 37.) As
11 such, Mr. Scott’s assault conviction could not have been a qualifying offense for career
12 offender purposes.⁷

13 IV. CONCLUSION

14 For the reasons set forth above, Petitioner’s sentence was “imposed in violation
15 of the Constitution or laws of the United States.” Petitioner is entitled to Section 2255
16 relief and should be resentenced under the non-career-offender guideline.

17 Respectfully submitted,

18 HILARY POTASHNER
19 Federal Public Defender

20
21 DATED: May 18, 2016

22 By /s/ Brianna Fuller Mircheff
23 BRIANNA FULLER MIRCHEFF
24 Deputy Federal Public Defender

25 ⁷ Moreover, even if assault were possibly a *prior* offense, it is not a crime of
26 violence under *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th Cir.
27 2014) (holding that 18 U.S.C. Section 111, assault of a federal officer, categorically
28 does not satisfy the force clause following *Johnson I* because it “does not require that
any particular level of force be used.” . . . In fact, a ‘defendant may be convicted of
violating section 111 if he or she uses *any force whatsoever* against a federal officer.’”)

EXHIBIT A

UNITED STATES OF AMERICA vs.

CR 02-938(A)-R

Defendant STEVE LOREN SCOTT

S.S.# -----6240

Residence: Metropolitan Detention Center
535 Alameda Street
Los Angeles, Ca 90012

Mailing: SAME

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person, on: JANUARY 8, 2007
Month / Day / Year

COUNSEL:

 WITHOUT COUNSEL

However, the court advised defendant of right to counsel and asked if defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

XX WITH COUNSEL Amy Jacks, appointed

 PLEA:

 GUILTY, and the Court being satisfied that there is a factual basis for the plea.

 NOLO CONTENDERE

 NOT GUILTY

FINDING:

There being a jury verdict of XX GUILTY, defendant has been convicted as charged of the offense(s) of: Racketeer Influenced and Corrupt Organizations Conspiracy in violation of Title 21 USC 1962(d) as charged in count 2 of the 1st superseding indictment.

JUDGMENT AND PROBATION/COMMITMENT ORDER:

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgement of the court the defendant is hereby committed to the Bureau of Prisons to be imprisoned for a term of:

Two hundred twenty (220) months, to be served consecutively to any sentence the defendant may currently be serving.

IT IS FURTHER ADJUDGED that upon release from imprisonment defendant shall be placed on supervised release for three (3) years, under the following terms and conditions: the defendant 1) shall comply with the rules and regulations of the U.S. Probation Office and General Order 318; 2) shall cooperate in the collection of a DNA sample from the defendant; 3) shall during the period of community supervision pay the special assessment in accordance with this judgment's orders pertaining to such payment; 4) shall not associate or affiliate with any member of any criminal or disruptive group as directed by the Probation Officer, specifically, any member of the Aryan Brotherhood.

-- GO TO PAGE TWO --

 WH
Deputy Clerk

U.S.A. V. STEVE LOREN SCOTT

CR 02-938(A)-R

-- CONTINUED FROM PAGE ONE --

PAGE TWO

JUDGMENT AND PROBATION/COMMITMENT ORDER

IT IS FURTHER ORDERED that all fines and costs of imprisonment are waived.

IT IS FURTHER ORDERED that defendant pay a special assessment of \$100.00, which is due immediately.

IT IS FURTHER ORDERED that any remaining counts and underlying indictments are dismissed as to this defendant.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. the Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

Signed by: District Judge


MANUEL L. REAL

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk of Court

Dated/Filed January 9, 2007
Month / Day / Year

By _____/S/
William Horrell, Deputy Clerk

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;
3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5. the defendant shall support his or her dependents and meet other family responsibilities;
6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7. the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;
8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to conform the defendant's compliance with such notification requirement;
15. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours;
16. and, for felony cases only: not possess a firearm, destructive device, or any other dangerous weapon.

☐ The defendant will also comply with the following special conditions pursuant to General Order 01-05 (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant shall pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment pursuant to 18 U.S.C. §3612(f)(1). Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed prior to April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant shall pay the balance as directed by the United States Attorney's Office. 18 U.S.C. §3613.

The defendant shall notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. §3612(b)(1)(F).

The defendant shall notify the Court through the Probation Office, and notify the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. §3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution pursuant to 18 U.S.C. §3664(k). See also 18 U.S.C. §3572(d)(3) and for probation 18 U.S.C. §3563(a)(7).

Payments shall be applied in the following order:

1. Special assessments pursuant to 18 U.S.C. §3013;
2. Restitution, in this sequence:
 - Private victims (individual and corporate),
 - Providers of compensation to private victims,
 - The United States as victim;
3. Fine;
4. Community restitution, pursuant to 18 U.S.C. §3663(c); and
5. Other penalties and costs.

SPECIAL CONDITIONS FOR PROBATION AND SUPERVISED RELEASE

As directed by the Probation Officer, the defendant shall provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant shall maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds shall be deposited into this account, which shall be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, shall be disclosed to the Probation Officer upon request.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on	_____	to	_____
Defendant noted on appeal on	_____		
Defendant released on	_____		
Mandate issued on	_____		
Defendant's appeal determined on	_____		
Defendant delivered on	_____	to	_____

at _____
the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

B
y

Date

Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

B
y

Filed
Date

Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant

Date

U. S. Probation Officer/Designated Witness

Date

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
February 2005 Grand Jury

UNITED STATES OF AMERICA,)	CR 02-938(E)
)	
Plaintiff,	)	<u>F I R S T</u>
	)	<u>S U P E R S E D I N G</u>
v.	)	<u>I N D I C T M E N T</u>
)	
STEVE LOREN SCOTT,	)	[18 U.S.C. § 1962(d): Racketeer
aka "Scottie,"	)	Influenced and Corrupt
	)	Organizations Conspiracy]
Defendant.)	
_____)	

The Grand Jury charges:

INTRODUCTORY ALLEGATIONS

THE RACKETEERING ENTERPRISE

1. At all relevant times, defendant[] ... STEVE LOREN SCOTT, aka "Scottie," ... and others, were members and associates of a criminal organization whose members and associates engaged in, among other things, murder, attempted murder, conspiracy to commit murder, extortion, robbery, and narcotics trafficking. At all relevant times, this organization, which is known as "the Aryan Brotherhood," operated in the Central District of California and elsewhere. The Aryan Brotherhood and the individuals who associate with it for criminal purposes constitute an "enterprise" as defined by Title 18, United States Code, Section 1961(4), that is, a group of individuals associated in fact, who engaged in, and whose activities affected, interstate and foreign commerce. The enterprise constituted an

1 ongoing organization whose members functioned as a continuing
2 unit for a common purpose of achieving the objectives of the
3 enterprise.

4 GENERAL BACKGROUND

5 2. The Aryan Brotherhood is a powerful gang that controls
6 drug distribution and other illegal activity within portions of
7 the California and federal prison systems and has worked to
8 expand its influence over illegal activity conducted outside of
9 prison.

10 3. The Aryan Brotherhood was formed in the California
11 prison system in approximately 1964 by white inmates who wanted
12 to gain power and authority in prison by forming a race-based
13 gang. While it is not necessary to be white to join the Aryan
14 Brotherhood, nearly all of its members are white. All Aryan
15 Brotherhood members are male.

16 4. Although the Aryan Brotherhood began in the California
17 prison system, it has spread to other prison systems. During the
18 early 1970's, members of the Aryan Brotherhood who had entered
19 the federal prison system formed a faction of the Aryan
20 Brotherhood in the federal prison system. Although the
21 California and federal factions have distinct membership and
22 leadership, both are part of one organization called the Aryan
23 Brotherhood. If a member of either faction enters the prison
24 system controlled by the other faction, that member automatically
25 becomes a member in his new prison system. Although there are
26 Aryan Brotherhood members in other prison systems, the California
27 and federal factions are the Aryan Brotherhood's primary
28 factions.

1 5. In addition to Aryan Brotherhood members in prison,
2 there are members who have been released from prison. When Aryan
3 Brotherhood members leave prison, they are required to remain
4 loyal to the Aryan Brotherhood and to work to further the goals
5 of the Aryan Brotherhood while in the community.

6 6. The Aryan Brotherhood enforces its rules and promotes
7 discipline among its members and associates by murdering,
8 attempting to murder, conspiring to murder, assaulting, and
9 threatening those who violate the enterprise's rules or pose a
10 threat to the enterprise. The Aryan Brotherhood also uses murder
11 and the threat of murder to maintain a position of power within
12 the California and federal prison systems. Inmates and others
13 who do not follow the orders of the Aryan Brotherhood are subject
14 to being murdered, as is anyone who uses violence against an
15 Aryan Brotherhood member. Inmates who cooperate with law
16 enforcement authorities are also subject to being murdered.

17 MEMBERSHIP

18 7. Aryan Brotherhood members are recruited from the prison
19 population. In order to be considered for membership in the
20 Aryan Brotherhood, an inmate must be sponsored by a member. Once
21 an inmate is sponsored, he generally must serve a term of
22 "probation" while his conduct is observed by the members of the
23 Aryan Brotherhood. If the inmate's conduct during the
24 probationary period is satisfactory, he is admitted into the
25 Aryan Brotherhood. Once accepted as an Aryan Brotherhood member,
26 the inmate must swear an oath of loyalty, pledging his life to
27 the Aryan Brotherhood.

28 8. Members are required to follow all orders of higher-

1 ranking members. In particular, members are required, when
2 ordered, to kill without hesitation. They are also required to
3 give false testimony in court on behalf of other members.
4 Members who do not fulfill their obligations to the Aryan
5 Brotherhood are subject to being murdered.

6 9. In addition to members, the enterprise includes those
7 closely affiliated with the Aryan Brotherhood, who are called
8 "associates." Associates are required to follow the orders of
9 Aryan Brotherhood members. Associates who do not fulfill their
10 obligations to the Aryan Brotherhood are subject to being
11 murdered.

12 LEADERSHIP STRUCTURE

13 10. Originally, the Aryan Brotherhood did not have a
14 leadership structure, but instead was governed by consensus. In
15 approximately 1980, with the blessing of the California faction
16 of the Aryan Brotherhood, the members of the federal faction
17 formed a three-man Federal "Commission" with authority over the
18 activities of the federal faction. In approximately 1993, the
19 members of the Federal Commission formed a "council," reporting
20 to the Federal Commission, with authority over day-to-day
21 operations of the federal faction.

22 11. In approximately 1982, inmates in the California
23 faction of the Aryan Brotherhood met and formed a 12-man
24 California Council to govern the faction's affairs. The members
25 of the California Council then formed a three-man California
26 Commission with authority over the California Council and all
27 other California Aryan Brotherhood members. The number of
28 members on the California Council has since been reduced to six.

1 12. In both the California and federal factions of the
2 Aryan Brotherhood, the commission in charge of a particular
3 faction has final authority over all matters involving that
4 faction. A murder of or assault on a member may be carried out
5 only if it is authorized by the commission of the faction to
6 which the member belongs, although the murder of a nonmember does
7 not require commission approval.

8 PURPOSES OF THE ENTERPRISE

9 13. The members of the Aryan Brotherhood and their
10 associates constitute an enterprise, referred to below as "the
11 Aryan Brotherhood," "the Aryan Brotherhood criminal enterprise,"
12 or "the enterprise." The word "member" as used below refers to a
13 full-fledged member of the Aryan Brotherhood. Both members and
14 associates of the Aryan Brotherhood are participants in the Aryan
15 Brotherhood criminal enterprise.

16 14. The purposes of the Aryan Brotherhood criminal
17 enterprise include, but are not limited to, the following:

18 a. Controlling illegal activities, such as narcotics
19 trafficking, gambling, and extortion, within the California and
20 federal prison systems.

21 b. Preserving, protecting, and expanding the power of
22 the Aryan Brotherhood through the use of intimidation, violence,
23 threats of violence, assaults, and murders.

24 c. Promoting and enhancing the Aryan Brotherhood and
25 the activities of its members and associates.

26 THE MEANS AND METHODS OF THE ENTERPRISE

27 15. Among the means and methods by which the defendants and
28 their co-racketeers conduct and participate in the conduct of the

1 affairs of the Aryan Brotherhood criminal enterprise are the
2 following:

3 a. Members of the Aryan Brotherhood use the Aryan
4 Brotherhood criminal enterprise to commit, and attempt and
5 threaten to commit, acts of violence, including murder and
6 assault, to protect and expand the enterprise's criminal
7 operations.

8 b. Members of the Aryan Brotherhood use the Aryan
9 Brotherhood criminal enterprise to promote a climate of fear
10 through violence and threats of violence.

11 c. Members of the Aryan Brotherhood promulgate rules
12 to be followed by all participants in the Aryan Brotherhood
13 criminal enterprise, including the rule that a participant in the
14 enterprise may not act as an informant for law enforcement
15 authorities.

16 d. To enforce the rules of the Aryan Brotherhood
17 criminal enterprise and to promote discipline, the members of the
18 Aryan Brotherhood use the enterprise to murder, attempt to
19 murder, assault, and threaten those participants in the
20 enterprise and others who violate rules or orders, or who pose a
21 threat to the enterprise.

22 e. To generate income, participants in the Aryan
23 Brotherhood criminal enterprise engage in illegal activities
24 under the protection of the enterprise, including narcotics
25 trafficking, bookmaking, extortion, robbery, and contract murder.

26 f. To generate income, participants in the Aryan
27 Brotherhood criminal enterprise require that white inmates
28 engaged in profit-making activities in prison pay "taxes" to the

1 Aryan Brotherhood under threat of violence.

2 g. To generate income, participants in the Aryan
3 Brotherhood criminal enterprise who are not in prison require
4 that white narcotics dealers and other white criminals pay
5 "taxes" to the Aryan Brotherhood under threat of violence.

6 h. To perpetuate the Aryan Brotherhood criminal
7 enterprise, participants in the enterprise attempt to conceal
8 from law enforcement the existence of the Aryan Brotherhood, the
9 identity of its participants, and the ways in which it conducts
10 its affairs.

11 i. To keep secret the activities of the Aryan
12 Brotherhood criminal enterprise, participants in the enterprise
13 communicate using codes and hidden messages, and use a network of
14 Aryan Brotherhood members and associates outside of prison to
15 relay messages to incarcerated members and associates.

COUNT TWO

[18 U.S.C. § 1962(d)]

65. Paragraphs One through Fifteen of the Introductory Allegations of this Indictment are realleged and incorporated by reference as though fully set forth herein.

66. From a date unknown to the Grand Jury and continuing until at least July 25, 2002, within the Central District of California and elsewhere, defendant[] ... STEVE LOREN SCOTT, aka "Scottie," ... and others known and unknown, being persons employed by and associated with the Aryan Brotherhood criminal enterprise described in Paragraphs One through Fifteen of the Introductory Allegations of this Indictment, as defined in Title 18, United States Code, Section 1961(4), which enterprise was engaged in, and the activities of which affected, interstate and foreign commerce, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together and with each other to violate Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Sections 1961(1) and 1961(5), consisting of multiple acts involving murder, in violation of ... Illinois Criminal Code Sections 8-2 and 9-1 ... Kansas Criminal Code Sections 21-3302 and 21-3401 ... and Missouri Revised Statutes Sections 562.041, 564.011, and 565.020; and distribution of controlled substances, including heroin, methamphetamine, and cocaine, in violation of Title 21, United States Code, Sections 841(a)(1), 843(b), and 846. It was a further part of the

1 conspiracy that the defendant[] agreed that a conspirator would
2 commit at least two acts of racketeering in the conduct of the
3 affairs of the enterprise.

4 OVERT ACTS

5 67. In furtherance of the conspiracy and to accomplish the
6 objects of the conspiracy, the defendant[] and [his]
7 coconspirators committed the following overt acts on the dates
8 set forth below:

9 Organization and Membership

10 1) In or about 1964, a group of inmates in the
11 California prison system formed the Aryan Brotherhood prison
12 gang.

13 2) In or about 1973, a group of inmates in the
14 federal prison system formed a federal faction of the Aryan
15 Brotherhood prison gang.

16 5) In or about 1980 ... Aryan Brotherhood members
17 formed a three-member "Federal Commission" ... to govern the
18 activities of the federal faction of the Aryan Brotherhood.

19 15) In or about 1993, [Aryan Brotherhood members]
20 formed a "Federal Council," reporting to the Federal Commission,
21 to govern the day-to-day operations of the federal faction of the
22 Aryan Brotherhood.

23 24) In or about 1997, the members of the Federal
24 Commission ... formed departments within the federal faction of
25 the Aryan Brotherhood, including a security department, a drug
26 department, a gambling department, and a business department.

27 25) In or about 1997, the members of the Federal
28 Commission, including ... BARRY BYRON MILLS and TYLER DAVIS

1 BINGHAM, placed defendant STEVE LOREN SCOTT in charge of the
2 Business Department.

3 33) On or about December 25, 1997, defendant STEVE
4 LOREN SCOTT sent a message to Lawrence Klaker informing Klaker of
5 recent promotions to the Federal Council and of new members of
6 the Aryan Brotherhood.

7 34) In or about 1998, the members of the Federal
8 Commission, including ... BARRY BYRON MILLS and TYLER DAVIS
9 BINGHAM, named defendant STEVE LOREN SCOTT to the Federal
10 Council.

11 Attempted Murder of Jimmy Lee Inman

12 99) In or before September 1993, ... BARRY BYRON MILLS
13 ordered Aryan Brotherhood member Kurt King to murder Jimmy Lee
14 Inman.

15 100) On or about September 30, 1993, Kurt King
16 attempted to murder Jimmy Lee Inman by stabbing him.

17 Attempted Murder of Ismael Benitez-Mendez

18 206) In or before January 1992, ... TYLER DAVIS BINGHAM
19 ordered defendant STEVE LOREN SCOTT to murder Ismael Benitez-
20 Mendez because Benitez-Mendez had assaulted an Aryan Brotherhood
21 associate.

22 207) On or about January 4, 1992, defendant STEVE LOREN
23 SCOTT attempted to murder Ismael Benitez-Mendez by stabbing him.

24 Distribution of Proceeds of Narcotics Trafficking

25 228) In or about August 1995, ... TYLER DAVIS BINGHAM,
26 MICHAEL PATRICK McELHINEY, and DAVID MICHAEL SAHAKIAN arranged to
27 have the proceeds of narcotics trafficking sent to defendant SEAN
28 MATTHEW DARCY.

1 235) On or about August 31, 1995, defendant SEAN
2 MATTHEW DARCY mailed a money order in the amount of \$105 to
3 defendant STEVE LOREN SCOTT at the Administrative Maximum
4 Facility at Florence, Colorado.

5 Race War with Black Inmates

6 297) On or about December 25, 1997, defendant STEVE
7 LOREN SCOTT sent a message to Aryan Brotherhood member Lawrence
8 Klaker informing Klaker that the Aryan Brotherhood was "at on
9 sight war" with the DC Blacks.

10 298) On or about December 29, 1997, defendant STEVE
11 LOREN SCOTT sent a message to Lawrence Klaker informing Klaker of
12 efforts to manufacture weapons to arm all members of the Aryan
13 Brotherhood for the war against the DC Blacks.

14 299) On or about January 30, 1998, defendant STEVE
15 LOREN SCOTT had secreted within his body a prison-made knife to
16 be used in the war against the DC Blacks.

17 302) On or about June 9, 1998, defendant STEVE LOREN
18 SCOTT possessed a "hit list" of black inmates who were to be
19 murdered.

20 359) On or about December 11, 1999, in the Central
21 District of California and elsewhere, defendant RONALD BOYD
22 SLOCUM mailed a letter to defendant STEVE LOREN SCOTT in which,
23 among other things, defendant RONALD BOYD SLOCUM said that he had
24 agreed to commit crimes with an Aryan Brotherhood member who was
25 later discovered to be cooperating with law enforcement
26 authorities.

EXHIBIT C

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7
8 Attorney for Defendant
9 STEVE LOREN SCOTT

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 STEVE LOREN SCOTT.,

16 Defendant.

) **CR. No. 02-938-R**

) **DEFENDANT SCOTT'S**
) **POSITION RE: SENTENCING**

) Date: January 8, 2007

) Time: 1:30 pm

) Ctrm: Hon. Manuel Real

17 TO THE HONORABLE MANUEL REAL, UNITED STATES DISTRICT
18 COURT JUDGE:

19 Defendant Steve Loren Scott, by and through his counsel, Amy E. Jacks,
20 respectfully presents his position regarding the sentence to be imposed following
21 his conviction of a violation of 18 U.S. C. 1962(d).

22 Dated: November 28, 2006 Respectfully submitted,

23 By _____

24 Amy E. Jacks
25 Attorney for Defendant
26 STEVE LOREN SCOTT
27
28

**I.
INTRODUCTION**

The Pre-Sentence Report, initially disclosed to counsel on November 7, 2006, incorrectly stated the maximum statutory penalty. Counsel conferred with counsel for the government and the Probation Officer was contacted regarding this error. A revised Pre-Sentence report was provided to counsel on November 15, 2006.

Mr. Scott submits corrections to the paragraphs describing the charges and convictions.

Mr. Scott objects as further described herein to paragraphs 10-37, which purport to describe the offense conduct. In the event these paragraphs are permitted to remain in the Pre-Sentence Report, Mr. Scott submits that additional statements regarding the circumstances of the offense should be included in order to more accurately describe the relevant conduct constituting the offense for which Mr. Scott was convicted. These factual submissions are contained herein.

Mr. Scott objects to the offense level calculation in the revised Pre-Sentence Report for the following reasons: the ex post facto clause of the United States Constitution requires the use of the November 1, 2001 Guidelines Manual; the multiple count adjustment is incorrectly applied; the calculation fails to take into account Mr. Scott's minimal participation in the offense; the career offender enhancement is incorrectly applied, since the current conviction does not fall within the definition of a "crime of violence"; and Mr. Scott's criminal history points are incorrectly calculated.

**II.
THE JURY VERDICT:
IT'S MEANING AND IMPACT ON GUIDELINE CALCULATIONS**

In United States v. Booker, 543 U.S. 220, 244 (2005) the United States Supreme Court held that the Sixth Amendment right to a jury trial extended to any fact (other than a prior conviction) which is necessary to support a sentence

1 exceeding the maximum authorized by the facts established by a plea of guilty or a
2 jury verdict . Therefore, in order to enhance a defendant's sentence by any such
3 fact, it must either be admitted by the defendant or proved to a jury beyond a
4 reasonable doubt.

5 The Booker court went on to hold that instead of binding the sentencing
6 court to the calculation made pursuant to the United States Sentencing Guidelines
7 (hereinafter the "Guidelines"), the Sentencing Reform Act requires the sentencing
8 court to consider the Guidelines but permits the court to tailor the sentence in light
9 of other statutory concerns. See § 3553(a)(4), Booker, *supra*, 543 U.S. at 245-
10 246. Thus, the Guideline calculation is to be viewed as one among a number of
11 sentencing factors set forth in 18 U.S.C. § 3553(a).

12 In order to accurately calculate the Guidelines sentence range, it is necessary
13 to examine the facts established by the jury verdict in this case.

14 Mr. Scott commenced trial on Count Two of the First Superseding
15 Indictment on September 26, 2006. During the course of the trial, the government
16 presented the testimony of seven (7) informants, who claimed that Mr. Scott
17 committed or aided and abetted various acts of violence within the federal prison
18 system on behalf of a prison gang named the Aryan Brotherhood (hereinafter, the
19 "AB"). These informants testified that Mr. Scott stated that he stabbed inmate
20 Ismael Benitez-Mendez on behalf of the AB on January 4, 1992 at United States
21 Penitentiary, Leavenworth, Kansas; provided a weapon to another inmate so that
22 the inmate could stab Jimmy Lee Inman on the prison yard at United States
23 Penitentiary, Marion, Illinois on September 30, 1993; conspired with other inmates
24 to murder inmate Frank Rupoli; stabbed inmate Erving Bond on November 24,
25 2000 at the United States Medical Center for Federal Prisoners, Springfield,
26 Missouri as part of an AB race war against black inmates; and conspired with other
27 inmates to carry out a contract murder against Walter "Wakil" Johnson on behalf
28 of John Gotti.

1 The government also introduced several letters, dated in December 1997 and
2 January 1998 and attributed to Mr. Scott. Among other things, these writings
3 discussed a war with black inmates from the District of Columbia (identified
4 during the trial as the “D.C. Blacks”), the location of weapons, the identity of allies
5 and potential enemies, and recent events within the federal prison system. The
6 letters were provided to another inmate, Lawrence Klaker, who was acting, at the
7 time, as an informant for the Special Investigative Unit at the United States
8 Administrative Detention, Maximum Security Prison (hereinafter “ADX”) located
9 in Florence , Colorado. In addition to these letters, the government introduced
10 another writing attributed to Mr. Scott entitled the “Party List.” This writing was
11 reportedly found in Mr. Scott’s property sometime between January-June 1998. It
12 contained a list of individuals associated or allied with the D.C. Black inmates and
13 included inmate Walter “Butch” or “Prince” Johnson.

14 At the conclusion of the case, the jury was instructed that in order to convict
15 Mr. Scott of Count Two, the RICO conspiracy, they need not find that the alleged
16 enterprise was actually established, that Mr. Scott was actually associated with the
17 enterprise, or that the enterprise or its activities actually affected interstate
18 commerce. Rather, they were instructed that, because the agreement to commit a
19 RICO offense is the essence of the charged RICO conspiracy offense, the
20 government need only prove that if the conspiracy offense were completed as
21 contemplated, the enterprise would be established, the defendant would be
22 associated with the enterprise, and the enterprise or its activities would affect
23 interstate commerce. See Government’s Instruction #3 as given by the court.

24 The jury was further instructed that to convict Mr. Scott on the charged
25 RICO conspiracy offense in Count Two, the government was not required to prove
26 that any defendant or any conspirator actually committed, caused, or aided and
27 abetted any racketeering act. Moreover, they were told, that it was not necessary,
28 in order to convict Mr. Scott of the charged conspiracy, that the objectives or

1 purposes of the conspiracy have been achieved or accomplished. “The ultimate
2 success or failure of the conspiracy is irrelevant. Rather, the conspiratorial
3 agreement to commit a RICO offense is the essential aspect of a RICO conspiracy
4 offense.” See Government’s Instruction #9 as given by the court.

5 Based on these instructions, the jury could return a guilty verdict on Count
6 Two without finding that the AB existed, that Mr. Scott was associated with the
7 AB, or that anyone within the AB committed any acts of racketeering.

8 On October 4, 2006, the jury commenced deliberations and on October 6,
9 2006, returned a verdict of guilty as to Count Two, a violation of 18 U.S.C.
10 1962(d), RICO conspiracy. The jury completed a special verdict form submitted
11 to them by the court. The form is attached as Exhibit 1.

12 The special verdict form did not require the jury to find whether a
13 racketeering enterprise was established; whether Mr. Scott was a member of or
14 associated with the racketeering enterprise; or whether any member of the
15 enterprise committed, caused, aided or abetted any racketeering act.

16 The special verdict form asked the jury to determine which acts of
17 racketeering Mr. Scott agreed would be committed in the event the racketeering
18 enterprise was established and the conspiracy was completed as contemplated . As
19 reflected in their special verdict form, the jury rejected each and every act of
20 violence alleged in the indictment that was supposedly perpetrated or aided by Mr.
21 Scott.

22 The only acts the jury found that Mr. Scott agreed would be committed in
23 the event the racketeering enterprise was established and the conspiracy was
24 completed as contemplated were the murder of Walter “Butch” Johnson and two
25 other unnamed D.C. Blacks. The “Party List” and Mr. Scott’s letters to Mr. Klaker
26 provided the evidentiary basis for these findings. Depending on the jury’s view of
27 the evidence, these writings were either made between December 27, 1997 and
28 January 16, 1998 or December 27, 1997 and June 9, 1998.

1 No evidence was presented, nor was the jury asked to find, that physical
2 force was used, attempted or threatened against Walter “Butch” Johnson or any
3 other D.C. Black inmate after Mr. Scott became a member of the charged
4 conspiracy. The jury was also not asked to make a special finding as to whether
5 Mr. Scott’s conduct “presented a serious potential risk of physical injury to
6 another.” *See* U.S.S.G. § 4B1.2 (a), defining crime of violence for purposes of
7 Guidelines calculations.

8 **III.**
9 **THE OFFENSE: OBJECTIONS AND ADDITIONS**
10 **TO THE FACTUAL STATEMENTS CONTAINED**
11 **WITHIN THE PRE-SENTENCE REPORT**

12 Mr. Scott makes the following objections and additions to the purported
13 factual statements contained in the Pre-Sentence Report:

14 Paragraph 3: In reaching their verdict, the jury made no affirmative finding
15 regarding the existence of the AB as a racketeering organization, Mr. Scott’s
16 association with the AB, the affect the AB had on interstate commerce or that any
17 member of the AB actually committed, caused, or aided and abetted any
18 racketeering act.

19 Paragraph 4: Count One of the first superceding indictment was dismissed
20 against Mr. Scott on July 26, 2006.

21 Paragraph 6: Mr. Scott was originally charged in Count Eight of the first
22 superceding indictment, the murder of Terry Walker. This count was dismissed
23 against Mr. Scott on June 30, 2006.

24 Paragraph 9: Mr. Scott objects to this paragraph to the extent it could be
25 interpreted that he made any statements or admissions about the Offense Conduct
26 as related in the Pre-Sentence Report Paragraphs 10-37. Although Mr. Scott and
27 his counsel met with the probation officer, Mr. Scott did not discuss the
28 circumstances of the offense. This fact is accurately reflected in Paragraph 40 of
the Pre-Sentence Report.

1 Paragraph 10: Mr. Scott objects to this paragraph and asks that it be stricken
2 from the report, since it states nothing more than an allegation contained in the
3 indictment. As discussed, *supra*, in II, the jury made no findings as to the
4 sufficiency of the proof of this allegation.

5 In the event the paragraph is not stricken, Mr. Scott objects to the assertion
6 that the AB's primary purpose was to maintain and enhance its position inside and
7 outside of prison and to make money through various illegal means. Substantial
8 evidence was presented at trial that the AB was formed to protect and defend white
9 inmates in an racially divided and extremely violent prison environment, and that
10 remained its primary goal. There was no evidence presented that Mr. Scott ever
11 benefitted financially from any association with the AB during his time in federal
12 prison. In fact, an examination of Mr. Scott's financial account during his time in
13 prison, an exhibit introduced at trial, establishes his indigent status throughout his
14 period of incarceration.

15 Paragraphs 11-24: Mr. Scott objects to these paragraphs and asks that they
16 be stricken, since, like Paragraph 10, they state nothing more than unproven
17 allegations contained in the indictment.

18 In the event that the paragraphs are not stricken, Mr. Scott requests that a
19 paragraph be added noting that the government sought to prove many of these
20 allegations through the testimony of informants. By referencing the jury's findings
21 in the special verdict form, it is evident that the testimony these informants was
22 rejected by the jury. Furthermore, substantial evidence was presented at trial that
23 the actions and values attributed to the AB are really attributable to the prison
24 population as a whole and form the basis of "convict culture."

25 Paragraphs 25-32: Mr. Scott objects to these paragraphs and requests that
26 they be stricken since they state nothing more than allegations contained in the
27 indictment. As discussed, *supra*, in rendering their verdict, the jury was not
28 required to find that the AB was actually established in the manner alleged or

1 engaged in activities as alleged in these paragraphs.

2 Paragraphs 33-37: Mr. Scott submits that the following facts should be
3 added so that the actions attributed to Mr. Scott are viewed fairly and within the
4 relevant context. These facts were established through the uncontroverted
5 testimony of the government's prison gang expert, Ms. Danine Adams.

6 (1) Prison is a dangerous environment. In prison, mistakes or slights that
7 would be excused or overlooked in free society, can result in extreme acts of
8 violence. Weapons are necessary for survival in prison. Weapons making is a
9 basic skill learned by every prison inmate.

10 (2) The D.C. Blacks are a group of black inmates committed to the Federal
11 Bureau of Prisons (hereinafter the "BOP") after committing acts of street terrorism
12 in the District of Columbia. They are a powerful force within the BOP because of
13 their overwhelming numbers, young age and penchant for violence.

14 (3) On November 5, 1996 at United States Penitentiary, Marion, Illinois,
15 (hereinafter "USP-Marion) Walter "Butch" Johnson, a leader among the D.C.
16 Black inmates, hit an older white inmate by the name of Joe Tokash in the head
17 with a radio. The attack was unprovoked. Mr. Tokash suffered head injuries as a
18 result of the attack.

19 (4) On January 2, 1997 at USP-Marion a group of D.C. Black inmates,
20 armed with knives, attacked a smaller group of white inmates on a recreation yard.
21 Some of the white inmates were seriously injured. As a result of this incident,
22 white and black inmates were transferred to the ADX in Florence, Colorado. D.C.
23 Black inmate, Walter "Butch" Johnson was among the inmates transferred.

24 (5) ADX staff were warned, prior to the transfer of Walter Johnson, of his
25 violent and provocative nature. Upon his arrival at ADX, Walter Johnson began to
26 recruit black inmates to participate in a race war against white inmates. In June of
27 1997, prison staff at ADX intercepted communication from Walter Johnson in
28 which he urged black inmates to attack white inmates on sight and stated "No

1 matter what, I'm at war and you will hear about it because when I see them it's
2 on."

3 (6) Prison officials at ADX did nothing to warn or protect white inmates
4 from assaults instigated by D.C. Black inmates. On August 22, 1997, white inmate
5 Anthony Pfeffer was attacked by a D.C. Black inmate. Shortly thereafter inmates
6 were segregated on the basis of race and not permitted to recreate together.

7 (7) In late December 1997, white inmate Lawrence Klaker was moved onto a
8 tier where he could communicate with Mr. Scott. Unbeknownst to Mr. Scott, Mr.
9 Klaker was an agent of the BOP and had been providing information on the racial
10 conflict to intelligence officials at the prison. Mr. Klaker and Mr. Scott knew each
11 other but had not been able to communicate with each other since the racial attacks
12 at ADX had begun.

13 (8) At this same time, prison officials at ADX were beginning to re-integrate
14 inmates and send inmates out to recreate in racially mixed groups.

15 (9) On January 22, 1998, John Sliverfox, an American Indian inmate, who
16 was considered by the D.C. Blacks to be an associate of the white inmates was
17 assaulted on the recreation yard by two D.C. Black inmates, Opio Moore and
18 James Holloway.

19 Paragraph 36: Mr. Scott notes that the testimony at trial showed that there
20 were conflicting stories as to when this list was seized. Names on this list were
21 referenced, in the order they appear on the list, in a January 16, 1998 ADX
22 intelligence report. He objects to the list, entitled "Party List" being referenced as
23 a "hit list." Evidence adduced at trial showed that Mr. Scott used the term "party"
24 in his communications to refer to individuals' gang or group affiliation and submits
25 that the list is a list of potential allies of Walter Johnson who may pose a threat to
26 white inmates .

27 Paragraph 38: Mr. Scott objects to the classification of any individual or
28 individuals being listed as victims of his conviction. The jury was instructed that

1 in order to convict Mr. Scott of Count 2 they need not find that the alleged
2 enterprise was actually established or that he was in fact actually associated with
3 the enterprise. Thus, in reaching their verdict, the jury was not required to find that
4 the AB existed, that the AB constituted a racketeering enterprise, that Mr. Scott
5 was associated with the AB, or that any member of the AB actually committed,
6 caused, or aided and abetted any racketeering act.

7 **IV.** 8 **GUIDELINES CALCULATIONS**

9 **1. Base Offense Level**

10 Pursuant to U.S.S.G. § 1B1.11(a), the Guidelines Manual in effect on the
11 date the defendant is sentenced shall apply. However, if the court determines that
12 use of the Guidelines Manual in effect on that date would violate the ex post facto
13 clause of the United States Constitution, the court shall use the Guidelines Manual
14 in effect on the date that the offense of conviction was committed. U.S.S.G.
15 § 1B1.11(b). In order to determine whether there is an ex post facto problem with
16 using the current edition of the Guidelines Manual, the calculations should be done
17 using both the current edition and the edition in effect at the time of the offense of
18 conviction. The recommended sentencing range should then be compared to
19 determine if the new Guidelines Manual works to the detriment of the defendant.

20 In both the November 1, 2005 Guidelines Manual and the November 1,
21 2001 Guidelines Manual, § 2E1.1(a) defines the base offense level as the greater of
22 (1) 19 or (2) the offense level applicable to the underlying racketeering activity. In
23 this case, the jury was not required to find that any racketeering activity,
24 whatsoever, was committed by Mr. Scott or any member of the alleged
25 racketeering enterprise. There being no factual finding of what underlying
26 racketeering activity, if any, occurred, Mr. Scott submits that the base offense level
27 should be 19.

28 Mr. Scott notes that his Sixth Amendment rights would be violated if any

1 fact finder other than the jury made a finding as to this fact that would be used to
2 increase the calculation of his Guidelines sentence. Mr. Scott objects to the court
3 making any such finding.

4 **2. Multiple Count Adjustment**

5 The revised Pre-Sentence Report suggests that the court impose a “multiple
6 count adjustment” of +3 units pursuant to U.S.S.G. § 3D1.4. Given the facts and
7 circumstances of this offense, the adjustment is inappropriate.

8 Mr. Scott was convicted of one count: conspiracy to commit racketeering.
9 The essence of the crime is the agreement to commit a RICO offense. The jury
10 was not required to find that any defendant or any conspirator actually committed,
11 caused, or aided and abetted any racketeering act. Nor were they required to find
12 that the objectives or purposes of the conspiracy were attempted, achieved or
13 accomplished.

14 U.S.S.G. § 3D1.1 outlines the procedure for determining offense level on
15 multiple counts. Mr. Scott was convicted of ONE count, not multiple counts.
16 And, based on the instructions given, because there was no requirement that Mr.
17 Scott, or anyone, actually commit any acts of racketeering, Mr. Scott submits that
18 this adjustment should not and does not apply.

19 **3. Adjustment for Role in the Offense**

20 U.S.S.G. § 3B1.2 (a) provides that the offense level should be decreased four
21 (4) levels if the defendant was a minimal participant in any criminal activity.
22 A “participant” is a person who is criminally responsible for the commission of the
23 offense. U.S.S.G. § 3B1.1 Application Notes. This adjustment is a heavily fact-
24 based determination, dependent on the circumstances of a particular case.

25 It is submitted that, for the following reasons, Mr. Scott was a minimal
26 participant in the conspiracy to commit racketeering:

27 The jury did not find that Mr. Scott personally perpetrated any acts of
28 violence against others in furtherance of the conspiracy;

1 The jury did not find that Mr. Scott personally ordered any specific act of
2 violence against others in furtherance of the conspiracy;

3 The jury did not find that Mr. Scott personally aided, abetted or otherwise
4 conspired to commit any act of violence in furtherance of the conspiracy.

5 Based on the jury's special verdict, the jury found that Mr. Scott was not a
6 participant in the racketeering conspiracy over a prolonged period of time;

7 While the jury found that Mr. Scott became a member of the conspiracy,
8 they did not find that any inmate was harmed in furtherance of the conspiracy after
9 Mr. Scott's joinder;

10 D.C. Black inmate, Butch Johnson, attacked an older white inmate and
11 declared war on all other white inmates prior to the time that Mr. Scott was found
12 to have become a member of the conspiracy.

13 Mr. Scott was motivated by a desire to protect himself and his friends from
14 potentially deadly attacks.

15 Mr. Scott was not motivated by a desire for financial gain.

16 Mr. Scott was living in an extremely dangerous environment and had no
17 control over which other inmates he would encounter and under what
18 circumstances.

19 **4. Career Offender Enhancement**

20 The revised Pre-Sentence Report suggests that career offender provisions of
21 U.S.S.G. § 4B1.1 are applicable to this case, since Mr. Scott is a career offender
22 and the instant offense is a qualifying "crime of violence."

23 Mr. Scott submits that the violation of 18 U.S.C. § 1962 (d), for which he
24 was convicted, is not a "crime of violence" as defined by U.S.S.G. § 4B1.2 (a).
25 Furthermore, the determination as to whether the current conviction constitutes a
26 "crime of violence" is a fact, not established by the jury verdict that would be used
27 to increase Mr. Scott's sentence. As such, Mr. Scott has a Sixth Amendment right
28 to have the fact proven to the jury beyond a reasonable doubt. Booker v. United

1 States, supra. Mr. Scott does not waive this Sixth Amendment right and objects to
2 the court making any factual determination that has the effect of increasing his
3 sentence under the Guidelines.

4 U.S.S.G. § 4B1.2 (a) defines a “crime of violence” as any offense, under
5 federal or state law, punishable by imprisonment for a term exceeding one year,
6 that (1) has as an element the use, attempted use, or threatened use of physical
7 force against the person of another, or (2) is burglary, arson, or extortion, involves
8 the use of explosives, or otherwise involves conduct that presents a serious
9 potential risk of physical injury to another.

10 As discussed above, the instructions given by the court made it clear that
11 there was no requirement that the jury find that any act, whatsoever, be committed
12 by Mr. Scott, or any co-conspirator for that matter, in order to convict him of the
13 racketeering conspiracy. *See* Government Instruction 9, as given by the court. In
14 fact, the court instructed the jury that the racketeering enterprise in question need
15 not even have existed for purposed of convicting Mr. Scott of Count Two. *See*
16 Government Instruction 3, given by the court.

17 By it’s very definition, the offense for which Mr. Scott was convicted does
18 not have, as one of it’s elements, the “use, attempted use, or threatened use of
19 physical force against the person of another” and does not meet the definition of
20 “crime of violence” delineated in 4B1.2 (a)(1).

21 That leaves the definition of 4B1.2 (a)(2). The 18 U.S.C. 1962(d)
22 conviction is not a burglary, arson or extortion and it does not involve the use of
23 explosives. The instant offense cannot constitute a “crime of violence” unless the
24 facts support the conclusion that it involves “conduct that presents a serious
25 potential risk of physical injury to another.”

26 After Booker, supra, the court is not in a position to make factual
27 determinations increasing a defendant’s sentence pursuant to the Guidelines.
28 Those facts must be presented to the jury and found to be proven beyond a

1 reasonable doubt. Although the jury was presented with a special verdict form,
2 they were not asked to determine if the government had proven, beyond a
3 reasonable doubt, that Mr. Scott's conduct presented "a serious potential risk of
4 physical injury to another", a fact necessary to designate the current crime as one
5 of violence under the Guidelines.

6 Even if the court were constitutionally permitted to make this determination,
7 the offense for which Mr. Scott was convicted, does not present a serious potential
8 risk of physical injury to another.

9 The Application Note 1 for this section states "the conduct set forth (*i.e.*
10 *expressly charged*) in the count of which the defendant was convicted ...by its
11 nature, presented a serious potential risk of physical injury to another." Emphasis
12 added. Note 2 states, "...in determining whether the offense is a crime of violence
13 or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense
14 of conviction (*i.e. the conduct of which the defendant was convicted*) is the focus
15 for the inquiry. Emphasis added.

16 Merriam-Webster Dictionary defines conduct as "the act, manner or process
17 of carrying on." The conduct expressly charged in Mr. Scott's conviction for
18 violating 18 U.S.C. 1962(d) is the act of agreeing. As the jury instruction stated:
19 "*the conspiratorial agreement to commit a RICO offense* is the essential aspect of a
20 RICO conspiracy offense." Emphasis added.

21 Based on the elements of the crime for which Mr. Scott was convicted,
22 conspiring to commit a RICO offense, is not in and of itself, conduct that presents
23 a serious potential risk of physical injury to another and does not form the basis for
24 qualifying this instant offense as a "crime of violence."

25 **5. Criminal History**

26 The Probation Officer calculated that Mr. Scott has eighteen (18) criminal
27 history points. Mr. Scott objects to this calculation since it includes points for
28 criminal conduct alleged to be part of the criminal conduct in this case; and lists

1 criminal conduct alleged to be part of the criminal conduct in this case as
2 convictions for which Mr. Scott was sentenced and serving time when he
3 committed the instant offense. Mr. Scott also objects to the characterization of the
4 facts and circumstances surrounding his stabbing of inmate Erving Bond as
5 incomplete and submits additional facts to be included in the offense description
6 for that crime.

7 The criminal history calculation includes five (5) criminal history points
8 added pursuant to U.S.S.G. § 4A1.1: three (3) points for the stabbing of Erving
9 Bond (§ 4A 1.1 (a)); and two (2) points for the possession of contraband in prison
10 (§ 4A 1.1 (b)). Because each of these offenses was alleged to be part of the
11 criminal conduct in the instant case, Mr. Scott objects to the offenses being
12 counted as “prior sentences of imprisonment” under 4A 1.1. The Probation
13 Officer’s calculation also includes three (3) points added pursuant to 4A1.1 (d) and
14 (e), and lists three offenses for which Mr. Scott was allegedly serving time. Again,
15 offenses which constitute part of the criminal conduct in this case are listed as
16 contributing to this increase in criminal history points.

17 Mr. Scott notes that Paragraph 94 misstates the date of offense for the Bond
18 stabbing. That date should be 11/24/00.

19 Mr. Scott objects to the allegations of paragraph 97 inasmuch as it does not
20 reflect the facts adduced at trial. Mr. Scott requests the addition of the following
21 facts:

22 (1) Percipient witness Rafael Calderon-Velasques testified that Mr. Scott did
23 not yell anything to threaten Mr. Bond prior to the stabbing;

24 (2) At the time of the stabbing the correctional officers were admittedly not
25 following BOP mandated procedures in moving maximum custody inmates.
26 Inmates were being moved to and from their cells with fewer than three
27 correctional officers. The correctional officers were not holding onto inmates as
28 required by BOP policy. They were also moving maximum custody inmates at the

1 same time in the same hallways. And, they were opening cell doors prior to
2 handcuffing inmates for movement. These precautionary procedures were in place
3 to protect both inmates and correctional officers. The failure of the correctional
4 officers to follow the movement procedures increased both the inmates' perception
5 of danger and the risk of harm to the inmates; and

6 (3) At the time of the stabbing, Mr. Scott's mental condition had deteriorated
7 because he was undergoing alpha-Interferon treatment for Hepatitis C. Mr. Scott's
8 attending physician, employed by the United States Medical Center for Federal
9 Prisoners at Springfield, Missouri, Dr. Tamer Khalil, acknowledged that in the
10 weeks surrounding the stabbing, Mr. Scott complained of impaired mental
11 functioning, increased anxiety, delusions and black-outs. Dr. Khalil was aware
12 that Mr. Scott's hemoglobin count was extremely low, that his brain was being
13 starved of oxygen and that the side effects Mr. Scott complained of had a
14 physiological origin caused by the Interferon treatment. Dr. Khalil did not want to
15 stop treatment due to the life threatening nature of Mr. Scott's illness. And, Mr.
16 Scott was not provided any mental health diagnosis or treatment. This impaired
17 mental state affected Mr. Scott's perception and judgment at the time of the
18 offense.

19 Paragraphs 100-102 of the Pre-Sentence Report state that Mr. Scott was
20 serving a sentence for USDC WDMO (docket number 01-03027-01). This is the
21 case in the Western District of Missouri in which Mr. Scott was prosecuted for the
22 November 24, 2000 stabbing of Mr. Bond. Mr. Scott was sentenced to 125 months
23 for the stabbing on January 7, 2003, several months after the indictment in this case
24 was unsealed. The conspiracy alleged in this case includes this offense and ended
25 prior to the imposition of Mr. Scott's sentence in the case. Mr. Scott objects to the
26 sentence being considered as a factor in calculating any additional points pursuant
27 to 4A1.1 (b) (d) or (e).

28 Furthermore, Paragraphs 100-102, reference Mr. Scott's misdemeanor

1 sentence out of the District of Colorado in case 98-1200M, in which he was
2 charged with possession of contraband in prison. That case involved Mr. Scott's
3 January 30, 1998 possession of a prison made knife. The conduct was alleged in
4 the indictment paragraph 299 as part of the race war with black inmates. Mr. Scott
5 objects to his sentence being considered as a factor in calculating any additional
6 points pursuant to 4A1.1 (b) (d) or (e).

7 Based upon these objections, Mr. Scott submits that he has a total of thirteen
8 (13) criminal history points.

9 **6. Guidelines Calculation**

10 Based on the above objections, Mr. Scott offers the following guidelines
11 calculation:

12	Base offense level §2A1.5:	19
13	Minimal participation §3B1.2	-4
14	Offense Level	15
15	Criminal history category	VI
16	Sentence	41-51 months

17
18 **V.
APPLICATION OF 18 U.S.C. § 3553 (A) FACTORS**

19 After Booker, *supra*, sentencing courts must not give undue emphasis to the
20 guidelines, rather they are to be viewed as one among a number of sentencing
21 factors set forth in 18 U.S.C. § 3553(a).

22 The primary directive in Section 3553(a) is for a sentencing court to “impose
23 a sentence sufficient, but not greater than necessary, to comply with the purposes
24 set forth in paragraph (2)...”. The court in determining an appropriate sentence
25 must consider not only the nature and circumstances of the offense and the history
26 and characteristics of the defendant; but also must be guided by the directive of
27 Section 3553 (a)(2) which provides the need for the sentence imposed:
28

- 1 (A) to reflect the seriousness of the offense, to promote respect for the
- 2 law, and to provide just punishment for the offense;
- 3 (B) to afford adequate deterrence to criminal conduct;
- 4 (C) to protect the public from further crimes of the defendant; and
- 5 (D) to provide the defendant with needed educational or vocational
- 6 training, medical care, or other correctional treatment in the most
- 7 effective manner.

8 Mr. Scott submits that a sentence within the Guideline range calculated
9 above of 41-51 months is appropriate in light of the 18 U.S.C. 3553 (a) factors.
10 Mr. Scott was convicted of a violation of 18 U.S.C. 1962(d), a conspiracy to
11 violate RICO. In examining the evidence and the jury's special verdict, it is
12 apparent that the conviction is based on the four letters the jury determined Mr.
13 Scott wrote to inmate Michael Klaker in December 1997 and January 1998 and Mr.
14 Scott's possession of the "Party List" sometime in January-June 1998.

15 The letters cannot be viewed in a vacuum. By all accounts, prison is an
16 extremely dangerous and racially charged environment. In order to survive,
17 inmates must be wary of the constant life threatening danger presented by other
18 inmates. Individuals band together for protection and support.

19 These letters were sent at the end of what was a year of extreme racial
20 tension and violence within the BOP. Violence that began at USP-Marion spread
21 to ADX, when inmates were transferred for disciplinary reasons. It is undisputed
22 that D.C. Black leader, Walter "Butch" Johnson, expressed an intent to attack
23 white inmates and was actively engaged in recruiting other D.C. Black inmates to
24 do the same. As a result of the violence, inmates were temporarily segregated. At
25 the time of the Klaker letters, Mr. Scott, Mr. Klaker and other inmates were being
26 reintegrated and sent to recreation with racially mixed groups. Importantly the
27 letters and the "Party List" were written and possessed within a very concentrated
28 time period, somewhere between three (3) weeks and six (6) months. Mr. Scott did

1 not attack any inmates named in the letters or the "Party List." The content of the
2 letters and the lack of any affirmative effort to attack other inmates, supports the
3 conclusion that the letters were written out of a concern about Mr. Klaker's
4 personal safety and ability to protect himself should he find himself on the tier or
5 prison yard with D.C. Black inmates.

6 The government contends that Mr. Scott should receive the maximum
7 sentence for his conduct in this case. To sentence Mr. Scott to the maximum of 20
8 years consecutive to his current term for trying to protect himself and others seems
9 incredibly disproportionate to his conduct as proven. In considering all of the
10 ways that 18 U.S. C. 1962(d) could be violated, certainly the violation shown in
11 this case, is at the low end of the spectrum.

12 The government urges the court to severely punish Mr. Scott because he
13 committed the 1992 assault on Mr. Benitez-Mendez and the 2000 assault on Erving
14 Bond.

15 At trial, Mr. Scott did all but prove his innocence of the Benitez-Mendez
16 stabbing. The correctional officer who witnessed the assault from an unobstructed
17 distance of forty (40) feet, identified the assailant as African-American. The
18 informants' testimony about purported admissions from Mr. Scott were
19 discredited. Their claims were late-blooming, inconsistent and misstated the
20 location and other facts relating to the stabbing. In one instance, an informant who
21 stated in 1993 that he did not know Mr. Scott, claimed, years later when he needed
22 a ticket out of jail, that Mr. Scott confided in him and confessed to the stabbing.
23 Another claiming that Mr. Scott showed him the location of the stabbing, pointed
24 to the completely wrong tier. The tattoo that BOP officials claimed that Mr. Scott
25 got thereafter to commemorate the event and his initiation into the AB was, in fact,
26 almost seven years old. The tattoo was depicted in a photograph of Mr. Scott taken
27 before he ever went to federal prison, and it was captured in a photograph taken the
28 day of the stabbing at Leavenworth looking anything but fresh. In spite of all of

1 the above facts, the government urges the court to punish Mr. Scott for this
2 offense. What legitimate penal interest could be served by punishing Mr. Scott for
3 a crime he did not commit?

4 And, in the case of Erving Bond, Mr. Scott has been severely punished for
5 his actions. In January 2003, after this indictment in this case, Mr. Scott received a
6 sentence of 125 months consecutive to his sentence for the stabbing of Mr. Bond.
7 Absent that sentence, Mr. Scott would have been released from federal prison in
8 2007. At the time he stabbed Mr. Bond, Mr. Scott was in an extremely diminished
9 physical and mental state. The BOP doctor explained the physiological reasons for
10 Mr. Scott's condition. The testimony of the guards and other inmates both,
11 described the lax security procedures in effect at the time of the incident. The jury
12 did not find that Mr. Bond was stabbed as part of a conspiracy to murder black
13 inmates. Again, it does not seem to suit any appropriate penalogical purpose to
14 further punish Mr. Scott for this offense.

15 Mr. Scott is fifty five (55) years old. He is currently serving a sentence that
16 will keep him in custody until he is almost seventy (70). Even if he were released
17 at the end of his current term, it is extremely unlikely that he would pose a
18 continuing danger to society.

19 VI. 20 CONCLUSION

21 Based on the foregoing, it is respectfully submitted that the court sentence
22 Mr. Scott to a term of 41-51 months in prison.

23 DATED: November 28, 2006

24 _____
25 AMY E. JACKS
26 Attorney for STEVE LOREN SCOTT
27
28

CERTIFICATE OF SERVICE

I, Amy E. Jacks hereby declare:

That I am employed in the County of Los Angeles, State of California; that my business address is 1717 Fourth St. Suite 300, Santa Monica, CA 90401; that I am over the age of eighteen and not a party to the within entitled action; that I am a member of the bar of this Court.

On November 28, 2006, I served a copy of:

DEFENDANT SCOTT'S POSITION RE: SENTENCING

Service was:

- ☒ Placed in a sealed envelope and mailed via United States Mail, addressed as follows:
- ☐ By hand delivery addressed as follows:
- ☐ By facsimile as follows:
- ☐ By messenger as follows:

AUSA Joey Blanch
U.S. Attorney's Office
312 N. Spring St., 15th Floor
Los Angeles, CA 90012

Mr. Michael Barrett
United States Probation Officer
312 N. Spring St. 6th Floor
Los Angeles, CA 90012

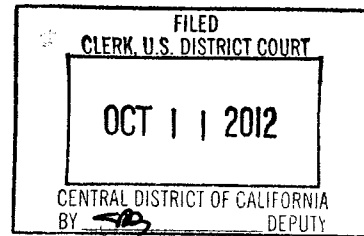
This Certificate is executed on November 28 , 2006 at Santa Monica, California. I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

AMY E. JACKS
Attorney at Law

EXHIBIT D

NAME STEVE LOREN SCOTT
PRISON IDENTIFICATION/BOOKING NO. 55341-065
U.S. PENITENTIARY - MAX
P.O. Box 8500
ADDRESS OR PLACE OF CONFINEMENT

FLORENCE, CO 81226-8500
Note: If represented by an attorney, provide name, address & telephone number. It is your responsibility to notify the Clerk of Court in writing of any change of address.



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

CASE NUMBER:

Plaintiff,

CV 12-8737 R

To be supplied by the Clerk of the United States District Court

v.

CR

Criminal case under which sentence was imposed.

STEVE LOREN SCOTT
FULL NAME OF MOVANT
(Include name under which you were convicted)

Petitioner.

MOTION TO VACATE, SET ASIDE OR
CORRECT SENTENCE BY A PERSON IN
FEDERAL CUSTODY
28 U.S.C § 2255

INSTRUCTIONS - READ CAREFULLY

This motion must be legibly handwritten or typewritten and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any questions use reverse side of sheet.

Additional pages are not permitted. No citation or authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

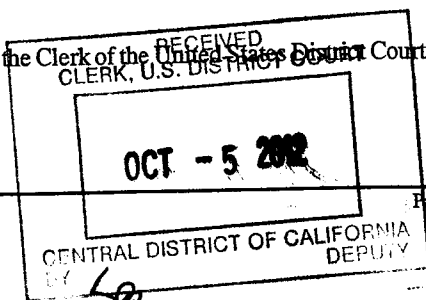
Upon receipt, your motion will be filed if it is in proper order. NO FEE is required with this motion

If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in a different districts, you must file separate motions as to each judgment.

Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

When the motion is fully completed, the original and three (3) copies must be mailed to the Clerk of the United States District Court, whose address is 312 North Spring Street, Los Angeles, California 90012.



MOTION

1. Name and location of court which entered judgment of conviction under attack: UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES, CA - WESTERN DIVISION
2. Date of judgment of conviction: VERDICT: 10/6/86; SENTENCING: 1/8/2007
3. Length of sentence: 220 MONTHS Sentencing judge: MANUEL L. REAL
4. Nature of offense or offenses for which you were convicted: R.I.C.O. CONSPIRACY
(18 U.S.C. § 1962(d))

5. What was your plea? (check one)

☒ Not guilty
☐ Guilty
☐ Nolo Contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (check one)

☒ Jury
☐ Judge only

7. Did you testify at the trial?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

- (a) Name of court NINTH CIRCUIT COURT OF APPEALS
- (b) Result AFFIRMED
- (c) Date of result 6/8/2008

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

☒ Yes ☐ No

11. If your answer to question number 10 was "yes", give the following information:

- (a) (1) Name of Court U.S. SUPREME COURT
- (2) Nature of proceeding PETITION FOR WRIT OF CERTIORARI
- (3) Grounds raised JUDICIAL MISCONDUCT
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
- ☐ Yes ☒ No
- (5) Result DENIED
- (6) Date of result OCTOBER 11, 2011

- (b) (1) Name of Court _____
- (2) Nature of proceeding _____
- (3) Grounds raised _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
- ☐ Yes ☐ No
- (5) Result _____
- (6) Date of result _____

- (c) (1) Name of Court _____
- (2) Nature of proceeding _____
- (3) Grounds raised _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
- ☐ Yes ☐ No

(5) Result _____

(6) Date of result _____

(d) Did you appeal, to an appellate federal court having jurisdiction, the results of action taken on any petition, application or motion?

(1) First petition, etc. ☐ Yes ☐ No

(2) Second petition, etc. ☐ Yes ☐ No

(3) Third petition, etc. ☐ Yes ☐ No

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date. For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you selected one or more of these grounds for relief, you must allege facts in support of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: INSUFFICIENT SPACE (CONTINUED ON FOLLOWING PAGES).

Supporting facts (tell your story briefly without citing cases or law): INSUFFICIENT SPACE (CONTINUED ON FOLLOWING PAGES)

B. Ground two: SEE A ABOVE

Supporting facts (tell your story briefly without citing cases or law):

C. Ground three: SEE A ABOVE

Supporting facts (tell your story briefly without citing cases or law):

D. Ground four: SEE A ABOVE

Supporting facts (tell your story briefly without citing cases or law):

13. If any of the grounds listed in 12 A, B, C and D were not previously presented, state briefly what grounds were not presented, and give your reasons for not presenting them: NO GROUNDS ASSERTED

HEREIN HAVE BEEN RAISED PREVIOUSLY DUE TO
INEFFECTIVE ASSISTANCE OF COUNSEL OR NEGLIGENCE.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

☐ Yes ☒ No

GROUND ONE

DENIAL OF DUE PROCESS THROUGH
INSUFFICIENT EVIDENCE RESULTING
IN MANIFEST INJUSTICE AND
CONVICTION OF INNOCENT PERSON,
ACCOMPANIED BY INEFFECTIVE
ASSISTANCE OF TRIAL AND APPELLATE
COUNSEL.

A. THE PREDICATES UPON WHICH THE
VERDICT RESTS DO NOT SATISFY
RICO'S STATUTORY DEFINITION OF
"RACKETEERING ACTIVITY" UNDER
18 U.S.C. § 1961 (1) (A).

THE PETITIONER WAS CONVICTED ON COUNT TWO OF THE
INDICTMENT CHARGING THAT HE VIOLATED 18 U.S.C. § 1962(d) (RICO
CONSPIRACY), WHICH REQUIRED PROOF OF HIS AGREEMENT THAT AT
LEAST TWO PREDICATE RACKETEERING ACTS WOULD BE COMMITTED
BY SOME MEMBER OF THE CONSPIRACY.

THE GOVERNMENT'S CASE-IN-CHIEF ATTEMPTED TO PROVE THAT
THE SCOPE OF THE PETITIONER'S CONSPIRATORIAL AGREEMENT
(6)

INCLUDED WHAT IT CHARACTERIZED AS EIGHT SEPARATE STATE LAW MURDER CONSPIRACIES AND TWO OR MORE DRUG TRAFFICKING CRIMES. THE SPECIAL VERDICT FORM INDICATED, HOWEVER, THAT THE JURY REJECTED ALL OF THE EVIDENCE DEALING WITH DRUG TRAFFICKING, AS WELL AS ALL OF THE EVIDENCE RELATING TO FIVE OF THE EIGHT MURDER CONSPIRACY ACTS. THIS LEFT ONLY THREE SO-CALLED RICO PREDICATES UPON WHICH THE ENTIRETY OF THE JURY'S VERDICT WAS BASED:

[6.] MURDER OF WALTER JOHNSON
(BUTCH / PRINCE): YES ☒ NO ☐

[7.] CONSPIRACY TO MURDER A D.C.
BLACK INMATE (EXCLUDING ERVING
BOND AND WALTER JOHNSON
(BUTCH / PRINCE)): YES ☒ NO ☐

[8.] CONSPIRACY TO MURDER A SECOND
D.C. BLACK INMATE (EXCLUDING
ERVING BOND AND WALTER JOHNSON
(BUTCH / PRINCE)): YES ☒ NO ☐

ACCORDING TO THE ORIGINAL INDICTMENT AND THE GOVERNMENT'S EVIDENCE AT TRIAL, THE FEDERAL FRACTION OF THE ARYAN BROTHERHOOD PRISON GANG WAS INVOLVED IN A

RACE WAR WITH THE D.C. BLACKS PRISON GANG BECAUSE WALTER (BUTCH) JOHNSON, A D.C. BLACK LEADER, STRUCK A WHITE INMATE AT THE FEDERAL PRISON IN MARION, ILLINOIS, IN THE HEAD WITH A RADIO. THIS WAR AMONG THE TWO FEDERAL PRISON GANGS WAS CHARGED IN THE INDICTMENT AS RACKETEERING ACT THIRTY-SEVEN / CONSPIRACY TO MURDER BLACK INMATES:

[55.] BEGINNING ON A DATE UNKNOWN TO THE GRAND JURY AND CONTINUING UNTIL AT LEAST NOVEMBER 24, 2000, WITHIN THE CENTRAL DISTRICT OF CALIFORNIA AND ELSEWHERE, DEFENDANTS BARRY BYRON MILLS, TYLER DAVID BINGHAM, RANDOLPH BYRD SLODIN, MICHAEL PATRICK McELHINEY, DAVID MICHAEL SARAKIAN, STEVE LOREN SCOTT, WAYNE BRIDGEMAN, STEVEN WILLIAM HICKLIN, CHRISTOPHER OUBRYAN GIBSON, JOHN STANLEY CAMPBELL, JR., JESSE ANTONIO VAN METER, RICHARD SCOTT McINTOSH, CARL EDGAR KNARR, JR., JASON LEE SCHWYHART, AND HODDY MICHAEL HANSON, AND OTHERS CONSPIRED TO MURDER BLACK INMATES IN THE INSTITUTIONS OF THE FEDERAL BUREAU OF PRISONS, AND A CONSPIRATOR COMMITTED AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY, IN VIOLATION OF CALIFORNIA PENAL CODE SECTIONS 182 AND 187.

ONE OF THE OVERT ACTS REFERENCED IN RACKETEERING ACT THIRTY-SEVEN WAS OVERT ACT 249, WHICH APPEARS IN THE ORIGINAL INDICTMENT DIRECTLY UNDER THE HEADING "RACE WAR WITH BLACK INMATES."

(8)

[249] IN OR ABOUT DECEMBER 1996,
DEFENDANT DAVID MICHAEL SAHARIAN
ORDERED ARYAN BROTHERHOOD ASSOCIATE
MICHAEL WAGNER TO ASSAULT A BLACK
INMATE NAMED BUTCH JOHNSON BECAUSE
JOHNSON HAD ASSAULTED A WHITE INMATE.

DURING THE PETITIONER'S TRIAL THE GOVERNMENT ALLEGED
THAT BUTCH JOHNSON'S ASSAULT ON A WHITE INMATE WAS THE
INCIDENT WHICH SPARKED THE SO-CALLED RACE WAR BETWEEN
THE ARYAN BROTHERHOOD AND THE D.C. BLACKS PRISON GANG.
WAGNER BUTCH JOHNSON APPEARS NOWHERE ELSE WITHIN THE ORIGINAL
INDICTMENT IN THE CONTEXT OF ANY OF THE INDIVIDUAL RACKETEERING ACTS.

SINCE THE PETITIONER WAS TRIED SEPARATELY, AND ONLY UPON A
SINGLE RICO CONSPIRACY COUNT, IT WAS STIPULATED BY THE GOVERNMENT
THAT ONLY A REDACTED PORTION OF THE INDICTMENT WHICH RELATED
TO THE CHARGE AGAINST THE PETITIONER SHOULD BE READ TO THE
JURY. THUS, THE JURY WAS INSTRUCTED THAT THE FOLLOWING
REDACTED CONSPIRACY COUNT WAS WHAT THE GOVERNMENT WAS
SEEKING TO PROVE:

FROM A DATE UNKNOWN TO THE GRAND JURY
AND CONTINUING UNTIL AT LEAST JULY 25, 2002,
WITHIN THE CENTRAL DISTRICT OF CALIFORNIA AND
(9)

ELSEWHERE, DEFENDANT [...]... STEVE LOREN SCOTT, aka "SCOTTIE,"... AND OTHERS KNOWN AND UNKNOWN, BEING PERSONS EMPLOYED BY AND ASSOCIATED WITH THE ARYAN BROTHERHOOD CRIMINAL ENTERPRISE DESCRIBED IN PARAGRAPHS ONE THROUGH FIFTEEN OF THE INTRODUCTORY ALLEGATIONS OF THIS INDICTMENT AS DEFINED IN TITLE 18, UNITED STATES CODE, SECTION 1961 (4), WHICH ENTERPRISE WAS ENGAGED IN, AND THE ACTIVITIES OF WHICH AFFECTED, INTERSTATE AND FOREIGN COMMERCE, UNLAWFULLY, WILLFULLY, AND KNOWINGLY COMBINED, CONSPIRED, CONFEDERATED, AND AGREED TOGETHER AND WITH EACH OTHER TO VIOLATE TITLE 18, UNITED STATES CODE, SECTION 1962 (C), THAT IS TO CONDUCT AND PARTICIPATE, DIRECTLY AND INDIRECTLY, IN THE CONDUCT OF THE AFFAIRS OF THE ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, AS THAT TERM IS DEFINED IN TITLE 18, UNITED STATES CODE, SECTIONS 1961 (1) AND 1961 (5), CONSISTING OF MULTIPLE ACTS INVOLVING MURDER, IN VIOLATION OF ... ILLINOIS CRIMINAL SECTIONS (10)

8-2 AND 9-1... KANSAS CRIMINAL CODE SECTIONS 21-3302 AND 21-3401... AND MISSOURI REVISED STATUTES SECTIONS 562.041, 564.011, AND 565.020; AND DISTRIBUTION OF CONTROLLED SUBSTANCES, INCLUDING HEROIN, METHAMPHETAMINE, AND COCAINE, IN VIOLATION OF TITLE 21, UNITED STATES CODE, SECTIONS 841(a)(1), 843(b), AND 846. IT WAS A FURTHER PART OF THE CONSPIRACY THAT THE DEFENDANT [] AGREED THAT A CONSPIRATOR WOULD COMMIT AT LEAST TWO ACTS OF RACKETEERING IN THE CONDUCT OF THE AFFAIRS OF THE ENTERPRISE.

ADDITIONALLY, THE GOVERNMENT STIPULATED THAT THE FOLLOWING OVERT ACTS (EXCLUDING FOR PRESENT PURPOSES THOSE RELATIVE TO PREDICATES THAT THE JURY REJECTED) APPLIED TO ITS CASE AGAINST THE DEFENDANT, AND AGREED THEREFORE THAT ONLY SAID OVERT ACTS SHOULD BE READ TO THE JURY:

"RACE WAR WITH BLACK INMATES"

[297] ON OR ABOUT DECEMBER 25, 1997, DEFENDANT STEVE LOREN SCOTT SENT A MESSAGE TO
(11)

ARYAN BROTHERHOOD MEMBER LAWRENCE KLAKER INFORMING KLAKER THAT THE ARYAN BROTHERHOOD WAS "AT ON SIGHT WAR" WITH THE D.C. BLACKS.

[298] ON OR ABOUT DECEMBER 29, 1997, DEFENDANT STEVE LOREN SCOTT SENT A MESSAGE TO LAWRENCE KLAKER INFORMING KLAKER OF EFFORTS TO MANUFACTURE WEAPONS TO ARM ALL MEMBERS OF THE ARYAN BROTHERHOOD FOR THE WAR AGAINST THE D.C. BLACKS.

[299] ON OR ABOUT JANUARY 30, 1998, DEFENDANT STEVE LOREN SCOTT HAD SECRETED WITHIN HIS BODY A PRISON-MADE KNIFE TO BE USED IN THE WAR AGAINST THE D.C. BLACKS.

[302] ON OR ABOUT JUNE 9, 1998, DEFENDANT STEVE LOREN SCOTT POSSESSED A "HIT LIST" OF BLACK INMATES WHO WERE TO BE MURDERED.

IT IS IMPORTANT TO BEAR IN MIND THAT EACH OF THESE

ALLEGED OVERT ACTS OCCURRED IN THE FEDERAL SUPREMAX (ADX), WHICH IS LOCATED IN FLORENCE, COLORADO, AND THAT, EVEN THOUGH THE CONSPIRACY COUNT OF THE ORIGINAL INDICTMENT LISTED THE MURDER STATUTES OF COLORADO AS BEING RELEVANT TO THE STATE LAW RICO PREDICATES, OR PATTERN OF RACKETEERING ACTIVITY, THE STIPULATED REDACTION OF THAT COUNT, WHICH BOTH PARTIES AGREED SHOULD BE READ TO THE JURY, OMITTED ANY MENTION OF COLORADO'S MURDER LAW ALTOGETHER.

IN EACH CASE WITHOUT EXCEPTION, NO MATTER HOW MANY CONSPIRACIES THE THREE PREDICATES ARE DIVIDED INTO, BECAUSE THEY OCCURRED WHOLLY WITHIN THE TERRITORIAL BOUNDS OF FEDERAL ENCLAVES, I.E., UNITED STATES PENITENTIARIES, OR "NEEDFUL BUILDINGS" CEDED TO THE FEDERAL GOVERNMENT, THEY WERE NOT VALID RICO PREDICATES, SUFFICIENT AS EVIDENCE UPON WHICH A CONVICTION FOR RICO CONSPIRACY COULD BE BASED. THIS IS SO PRIMARILY BECAUSE A CONVICTION FOR RICO CONSPIRACY UNDER 18 U.S.C. § 1962(d) REQUIRES PROOF OF AN AGREEMENT THAT ALL OF THE ELEMENTS OF 18 U.S.C. § 1962(c) WOULD BE SATISFIED. AMONG THOSE ELEMENTS IS THE REQUIREMENT THAT A PATTERN OF RACKETEERING ACTIVITY WOULD TAKE PLACE, MEANING SIMPLY THAT AT LEAST TWO SEPARATE BUT RELATED RACKETEERING ACTS (CRIMES) WOULD BE COMMITTED. THE RACKETEERING ACTS UPON WHICH THE PETITIONER WAS CONVICTED

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WERE, ACCORDING TO THE SPECIAL VERDICT FORM, STATE CRIMES, AND, TO QUALIFY AS RICO PREDICATES, IT WAS NECESSARY THAT THEY MEET THE STATUTORY DEFINITION OF 18 U.S.C. § 1961(1)(A), WHICH STATES IN RELEVANT PART:

AS USED IN THIS CHAPTER—

(1) "RACKETEERING ACTIVITY" MEANS

(A) ANY ACT OR THREAT INVOLVING MURDER..., WHICH IS CHARGEABLE UNDER STATE LAW AND PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR;

THERE CAN BE NO DISPUTE THAT EACH OF THE SO-CALLED STATE CRIME PREDICATES (ALL SUPPOSEDLY SEPARATE CONSPIRACIES TO COMMIT MURDER) WERE NEVER CHARGEABLE OR PUNISHABLE BY ANY STATE DUE TO A COMPLETE LACK OF SUBJECT MATTER OR PERSONAL JURISDICTION. THEY DID NOT OCCUR WITHIN ANY STATE. THEY OCCURED WHOLLY AND ENTIRELY WITHIN FEDERAL ENCLAVES "IN THE INSTITUTIONS OF THE FEDERAL BUREAU OF PRISONS," (QUOTING RACKETEERING ACT 37). AT NO TIME COULD ANY STATE LAW ENFORCEMENT AGENCY HAVE CHARGED THE PETITIONER, NOR COULD ANY STATE COURT HAVE PUNISHED HIM.

SEE, e.g., UNITED STATES V. SLOCUM, 486 F. SUPP.2d 1104 (C.D. CA. 2007):

THE RICO STATUTE DEFINES
"RACKETEERING ACTIVITY" TO
INCLUDE "ANY ACT OR THREAT
INVOLVING MURDER... WHICH
IS CHARGEABLE UNDER STATE LAW
AND PUNISHABLE BY IMPRISONMENT
FOR MORE THAN ONE YEAR..."
18 U.S.C. §1961. ALTHOUGH A MURDER
IS TECHNICALLY "CHARGEABLE UNDER
STATE LAW," IF AN AFFIRMATIVE
DEFENSE EXISTS, SUCH A MURDER
WOULD NOT BE "PUNISHABLE AT ALL."
(CITING UNITED STATES V. MUSKOVSKY,
863 F.2d 1319, 1334-31 (7TH CIR. 1988)).

NOTABLY, THE MUSKOVSKY DECISION CITED BY THE COURT IN
SLOCUM RELIED UPON UNITED STATES V. TONRY, 837 F.2d 1281
(5TH CIR. 1988), A TRAVEL ACT CASE THAT WAS REVERSED ON
APPEAL BECAUSE THE PREDICATE STATE LAW BRIBERY OFFENSE
WAS NOT TECHNICALLY "IN VIOLATION OF THE LAWS OF THE
STATE IN WHICH COMMITTED," SINCE THE PERSON BRIBED
DID NOT QUALIFY WITHIN THE DEFINITION OF THE PARTICULAR
(15)

STATE STATUTE (I.E., LOUISIANA, ALTHOUGH THE FACTS WOULD HAVE CONSTITUTED BRIBERY IN OTHER STATES). THE TONRY COURT NOTED THAT STATUTES SHOULD BE CONSTRUED TO AVOID CONSTITUTIONAL QUESTIONS, AND THAT SERIOUS CONSTITUTIONAL QUESTIONS OF FAIR NOTICE WOULD BE RAISED IF THE STATUTE IN QUESTION WAS BROADLY CONSTRUED TO INCLUDE CONDUCT THAT COULD NOT BE ANTICIPATED BY ITS PLAIN LANGUAGE.

THE SAME RATIONALE APPLIES TO THE SUBJECT CASE. FEDERAL PRISONERS IN FEDERAL PRISONS KNOW THAT ANY ACTS THEY UNDERTAKE CAN NEVER BE PROSECUTED BY A PARTICULAR STATE, THAT SUCH CRIMES ARE NEITHER "CHARGEABLE" NOR "PUNISHABLE" IN THE STATE COURT SYSTEMS, AND IT IS ENTIRELY UNFAIR AND CONTRARY TO DUE PROCESS "NOTICE" PROTECTIONS TO STRETCH THE PHRASE "CHARGEABLE UNDER STATE LAW" BEYOND ITS ORDINARY, COMMON SENSE MEANING TO INCLUDE PREDICATE CRIMES THAT ARE COMPLETELY BEYOND THE REACH OF A PARTICULAR STATE'S LAW ALTOGETHER.

ALL OF THIS IS NOT TO SAY THAT CONSPIRACY TO COMMIT MURDER WITHIN THE CONFINES OF A FEDERAL ENCLAVE IS NOT AGAINST SOME LAW. OBVIOUSLY IT IS A FEDERAL CRIME. AND, HAD CONGRESS SO INTENDED, IT COULD HAVE EASILY LISTED IT AS A §1961(1)(B) RICO PREDICATE.
(16)

INDEED, CONGRESS DID LIST EXTORTION AS BOTH A STATE LAW PREDICATE AND A FEDERAL LAW PREDICATE. (SEE 18 U.S.C. § 1951). OR, AS IT DID WITH VICAR (18 U.S.C. § 1959), CONGRESS COULD HAVE SIMPLY USED THE ALL INCLUSIVE LANGUAGE OF "IN VIOLATION OF THE LAWS OF ANY STATE OR OF THE UNITED STATES." BUT CONGRESS TOOK NEITHER OF THESE APPROACHES WHEN DRAFTING RICO. INSTEAD, IT CAREFULLY AND METHODICALLY DEWEATED ONLY VERY SPECIFIC STATE CRIMES AND FEDERAL CRIMES THAT IT THOUGHT WOULD BE RELEVANT TO RICO BECAUSE OF THEIR EFFECT ON INTERSTATE COMMERCE, OR, MORE PARTICULARLY THEIR EFFECT ON LOCAL BUSINESSES THAT WERE BEING VICTIMIZED BY ORGANIZED CRIME (I.E., THE MAFIA). AND THE FACT THAT CONGRESS WAS NOT CONCERNED WITH INTER-PRISON CRIMES IN FEDERAL PENITENTIARIES (THAT UNDER NO STRETCH OF THE IMAGINATION WOULD AFFECT LOCAL BUSINESS) IS ABUNDANTLY CLEAR FROM ITS EXCLUSION OF ANY PERIOD OF IMPRISONMENT "IN THE PREDICATE CRIME LIMITATION PERIOD":

§ 1961 (5): "PATTERN OF RACKETEERING ACTIVITY" REQUIRES AT LEAST TWO ACTS OF RACKETEERING ACTIVITY, ONE OF WHICH OCCURRED AFTER THE EFFECTIVE DATE OF THIS CHAPTER AND THE LAST OF WHICH OCCURRED WITHIN TEN YEARS (EXCLUDING ANY PERIOD)

(17)

OF IMPRISONMENT) AFTER THE COMMISSION
OF A PRIOR ACT OF RACKETEERING.

BECAUSE THE THREE STATE LAW MURDER CONSPIRACY
PREDICATES UPON WHICH THE JURY'S VERDICT WAS BASED ALL
ALLEGEDLY OCCURRED WHILE THE PETITIONER WAS CONFINED
WITHIN THE "INSTITUTIONS OF THE FEDERAL BUREAU OF PRISONS,"
I.E., WHOLLY WITHIN THE EXCLUSIVE TERRITORY OF THE
UNITED STATES, SAID CRIMES WERE NEVER "CHARGEABLE"
OR "PUNISHABLE" BY ANY STATE IN AND OF ITSELF, AND,
THEREFORE, NO PATTERN OF RACKETEERING ACTIVITY WAS
PROVED THAT COULD EVEN PLAUSIBLY CONSTITUTE
SUFFICIENT EVIDENCE TO SUPPORT THE PETITIONER'S CONVICTIONS
FOR RICO CONSPIRACY.

B. THE THREE STATE MURDER CONSPIRACY
"ACTS" UPON WHICH THE VERDICT
DEPENDENT WERE BUT A SINGLE
CONSPIRACY TO MURDER D.C. BLACK
INMATES AS PART OF A WAR BETWEEN
TWO RIVAL PRISON GANGS; THEREFORE,
THE EVIDENCE WAS INSUFFICIENT TO
PROVE THAT THE PETITIONER AGREED THAT
A "PATTERN" OF RACKETEERING ACTIVITY WOULD TAKE PLACE.

ALTHOUGH THE PETITIONER WAS TRIED FOR RICO CONSPIRACY AND NOT SUBSTANTIVE RICO, THE FACT THAT RACKETEERING ACT THIRTY-SEVEN OF THE ORIGINAL INDICTMENT SET FORTH AS A SINGLE CONSPIRACY THE WAR WITH THE D.C. BLACKS IS UNDENIABLE EVIDENCE THAT EACH OF THE SPECIAL VERDICT FORMS "GUILTY" ACTS WERE MERELY MULTIPLE OBJECTS OF A SINGLE CONSPIRACY THAT CONSISTED ONLY OF A SINGLE AGREEMENT BY THE PETITIONER.

AND BEYOND THIS TELLING DEMONSTRATION IN THE INDICTMENT, THE GOVERNMENT'S EVIDENCE AT TRIAL ALSO PROVED NO MORE THAN THAT THE CONSPIRACY TO MURDER D.C. BLACK GANG MEMBERS WAS A SINGLE CONSPIRACY WITH MULTIPLE OBJECTS. THE GOVERNMENT'S CLOSING ARGUMENT, AT PAGE 17, ADMITS AS MUCH:

"LET'S TALK ABOUT THE WAR WITH THE D.C. BLACKS. THERE SPECIFICALLY YOU HAVE HARD PHYSICAL EVIDENCE THAT THIS DEFENDANT AGREED THAT MEMBERS OF HIS CONSPIRACY, MEMBERS OF THE ARKAD BROTHERHOOD WOULD COMMIT ACTS INVOLVING MURDER."

THE EVIDENCE SHOWED THAT WALTER BUTCH JOHNSON WAS A LEADER OF THE D.C. BLACKS AND THAT HE STARTED THE WAR

BETWEEN THE D.C. BLACKS AND THE ARYAN BROTHERHOOD WHEN HE HIT JOE TOKASH IN THE HEAD WITH A RADIO AT USP MARION. ONLY THEN, AND SPECIFICALLY AS A CONSEQUENCE THEREOF, DID THE WAR WITH THE D.C. BLACKS ENSUE. AND THE FIRST RETALIATORY RESPONSE FOR THE RADIO - ASSAULT INCIDENT IS LISTED IN THE ORIGINAL INDICTMENT AS OVERT ACT 249 DIRECTLY BENEATH THE HEADING "RACE WAR WITH BLACK INMATES" (WHICH IS OBVIOUSLY MEANT TO COINCIDE WITH RACKETEERING ACT THIRTY SEVEN):

[249] IN OR ABOUT DECEMBER 1996, DEFENDANT DAVID MICHAEL SAHAKIAN ORDERED ARYAN BROTHERHOOD ASSOCIATE MICHAEL WAGNER TO ASSAULT A BLACK INMATE NAMED BUTCH JOHNSON BECAUSE JOHNSON HAD ASSAULTED A WHITE INMATE.

THEN, IN OVERT ACT 250, THE GOVERNMENT ALLEGED THAT BUTCH JOHNSON WAS ACTUALLY ASSAULTED BY MICHAEL WAGNER AS ORDERED. BUT OVERT ACTS ARE NOT INDIVIDUAL CONSPIRACIES, NOR ARE THEY "ACTS INVOLVING MURDER" SEPARATELY CHARGEABLE AND PUNISHABLE UNDER STATE LAW. THEY ARE NOT, THAT IS TO SAY, VALID RICO PREDICATES IN AND OF THEMSELVES, ALTHOUGH IT IS ABSOLUTELY CLEAR THAT THE GOVERNMENT THOUGHT THEY WOULD WORK JUST AS WELL.

AND TO SAY THAT THE WAR WITH THE D.C. BLACKS WAS ONLY A SINGLE MURDER CONSPIRACY FOR PURPOSES OF RACKETEERING ACT THIRTY-SEVEN, BUT THAT IT WAS MULTIPLE CONSPIRACIES FOR THE PURPOSE OF SHOWING THAT THE PETITIONERS' RICO CONSPIRACY INCLUDED THE REQUISITE PATTERN OF RACKETEERING ACTIVITY, DEFIES LOGIC. EITHER THE WAR WAS A SINGLE CONSPIRACY, OR IT WAS MULTIPLE CONSPIRACIES, BUT IN NO EVENT WAS IT BOTH.

THE ESSENTIAL ELEMENT OF THE STATUTORY CRIME OF CONSPIRACY IS THE EXISTENCE OF AN "AGREEMENT". AS THE SUPREME COURT STATED IN BRAVERMAN V. UNITED STATES, 317 U.S. 49 (1942), "THE GIST OF THE CRIME OF CONSPIRACY AS DEFINED BY THE STATUTE IS THE AGREEMENT... OF THE CONSPIRATORS TO COMMIT ONE OR MORE UNLAWFUL ACTS." BECAUSE IT IS THE CONSPIRATORIAL AGREEMENT THAT THE STATUTE PUNISHES, A SINGLE AGREEMENT MAY HAVE MULTIPLE OBJECTS. Id., 317 U.S. AT 53-54. SEE, E.G., HAIRSTON V. UNITED STATES, 905 A.2d 765 (D.C. Ct. OF APP. 2006) (INDICTMENT CHARGING SINGLE COUNT OF PARTICIPATION IN A VAST, GENERALIZED CONSPIRACY TO ASSAULT AND MURDER RIVAL GANG MEMBERS). SEE ALSO, BUI V. HEDGPETH, 2009 U.S. DIST. LEXIS 124401, FN 8 (CENTRAL DISTRICT OF CA) (UNDER CALIFORNIA LAW, "A SINGLE AGREEMENT TO COMMIT A NUMBER OF CRIMES IS ONLY ONE CONSPIRACY, REGARDLESS OF THE NUMBER OF CRIMES

SOUGHT TO BE COMMITTED OR THAT ARE COMMITTED, UNDER THAT CONSPIRACY."); UNITED STATES V. GORDON, 844 F.2d 1397, 1401 (9TH CIR. 1988) (THE EVIDENCE OF A SINGLE CONSPIRACY ASKS "WHETHER THERE WAS ONE OVERALL AGREEMENT AMONG THE VARIOUS PARTIES TO PERFORM VARIOUS FUNCTIONS IN ORDER TO CARRY OUT THE OBJECTIVES OF THE CONSPIRACY.")

AS THE SPECIAL VERDICT FORM MADE CLEAR, IT WAS INCUMBENT UPON THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE PETITIONER'S RICO CONSPIRACY AGREEMENT ALSO INCLUDED AT LEAST TWO UNDERLYING CONSPIRATORIAL AGREEMENTS IN ORDER TO SHOW THE REQUIRED PATTERN OF RACKETEERING ACTIVITY. AND THE FACT THAT ALL OF THE NAME-BEARING SPECIAL VERDICT FORM ACTS HAD CORRESPONDING RACKETEERING ACT PREDICATES IN THE ORIGINAL INDICTMENT, BUT THE THREE CONSPIRACIES INVOLVING WALTER BUTCH JOHNSON AND THE TWO UNNAMED D.C. BLACK INMATES DID NOT CORRESPOND TO ANY RACKETEERING ACT PREDICATE OTHER THAN RACKETEERING ACT THIRTY-SEVEN (THE RACE WAR CONSPIRACY), SHOWS CLEARLY THAT THE LATTER THREE WERE ONE.

SPECIAL VERDICT FORM ACTS / RACKETEERING ACTS (R.A.):

1. ISMAEL BENITEZ MENDEZ: R.A. # 9;
(22)

2. JIMMY LEE INMAN: R.A. #20;
3. FRANK RUOPOLI: R.A. #35;
4. ERVING BOND: R.A. #46;
5. WALTER JOHNSON (WAKIAL): R.A. #34;
6. WALTER JOHNSON (BUTCH/PRINCE): R.A. #37;
7. A D.C. BLACK INMATE: R.A. #37;
8. A SECOND D.C. BLACK INMATE: R.A. #37.

OF COURSE, UNDER THE GOVERNMENT'S THEORY, THE CONSPIRACY TO MURDER D.C. BLACK INMATES INVOLVED ESSENTIALLY EVERY D.C. BLACK INMATE IN THE FEDERAL PRISON SYSTEM SO, IN USING THAT THEORY FOR ITS METHODOLOGY IN DRAFTING THE SPECIAL VERDICT FORM, THERE WAS NOTHING TO PREVENT THE GOVERNMENT FROM LISTING A VERITABLE MULTITUDE OF PATTERN ACTS (E.G., A THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, ETC., AD INFINITUM, UNNAMED BLACK INMATE). BUT THE GOVERNMENT'S METHODOLOGY WAS FATALLY FLAWED AND STATUTORILY UNAUTHORIZED.

AGAIN, ACCORDING TO THE RICO STATUTE, "RACKETEERING ACTIVITY" MEANS ANY ACT INVOLVING MURDER WHICH IS CHARGEABLE UNDER STATE LAW AND PUNISHABLE BY MORE THAN ONE YEAR IMPRISONMENT. 18 U.S.C. § 1961 (1)(A). AND A "PATTERN" OF RACKETEERING ACTIVITY MUST CONSIST OF AT LEAST TWO SUCH CHARGEABLE AND PUNISHABLE ACTS. 18 U.S.C.

(23)

§ 1961 (5). IN ORDER TO CONVICT THE PETITIONER OF RICO CONSPIRACY IT WAS NECESSARY TO PROVE THAT THE SCOPE OF HIS CONSPIRATORIAL AGREEMENT ENCOMPASSED HIS ACKNOWLEDGMENT THAT EITHER HE OR SOME MEMBER OF THE RICO CONSPIRACY WOULD AGREE TO COMMIT SUCH A PATTERN OF RACKETEERING ACTIVITY. IN CONVICTING THE PETITIONER AT TRIAL, THE JURY "UNANIMOUSLY FOUND THE DEFENDANT AGREED THAT ACTS INVOLVING MURDER WOULD BE COMMITTED" AND "IDENTIF[IED] WHICH ACTS INVOLVING MURDER [IT] UNANIMOUSLY FOUND THAT THE DEFENDANT AGREED WOULD BE COMMITTED" AS FOLLOWS:

6. MURDER OF WALTER JOHNSON (BUTCH/PRINCE): YES ☒ NO ☐

7. CONSPIRACY TO MURDER A D.C. BLACK INMATE (EXCLUDING ERVING BOND AND WALTER JOHNSON (BUTCH/PRINCE)): YES ☒ NO ☐

8. CONSPIRACY TO MURDER A SECOND D.C. BLACK INMATE (EXCLUDING ERVING BOND AND WALTER JOHNSON (BUTCH/PRINCE)): YES ☒ NO ☐

CLEARLY, THESE SO-CALLED "ACTS" WERE NOTHING MORE THAN INTERRELATED OBJECTS OF A SINGLE CONSPIRATORIAL AGREEMENT (WHICH IS THE "ACT" UNDER CONSPIRACY LAW).
(24)

AND THIS FACT IS OBVIOUS FROM THEIR WORDING ALONE. ACTS 7 AND 8 BOTH MENTION BUTCH JOHNSON IN THEIR CONSPIRATORIAL CONTEXT TO AVOID UNANIMITY CONFUSION, THEY ARE BOTH EXPLICITLY IDENTIFIED AS THE SAME CONSPIRACY TO MURDER A FIRST AND A SECOND UNNAMED D.C. BLACK INMATE, AND ACT 6 IS THE CONSPIRACY TO MURDER BUTCH JOHNSON BECAUSE HE IS THE D.C. BLACK INMATE WHO STARTED THE WAR WITH THE D.C. BLACK INMATES.

THE JURY'S VERDICT WAS UNANIMOUS THAT THE PETITIONER AGREED THAT A CONSPIRACY TO MURDER D.C. BLACK INMATES WOULD BE COMMITTED, BUT BECAUSE THAT CONSPIRACY WAS ENTIRELY SINGULAR, THERE IS NO JURY VERDICT THAT UNANIMOUSLY FOUND THE PETITIONER GUILTY OF CONSPIRING TO VIOLATE RICO, AS PROHIBITED BY 18 U.S.C. § 1962(d), BECAUSE HIS CONSPIRATORIAL AGREEMENT WAS NEVER PROVED TO ENCOMPASS MORE THAN ONE ACT INVOLVING MURDER CHARGEABLE AND PUNISHABLE UNDER STATE LAW. ACCORDINGLY, AND BEYOND ITS CONSTITUTIONAL IMPLICATIONS, THIS MATTER CONSTITUTES AN ERROR IN THE RECORD ARISING FROM OVERSIGHT OR OMISSION THAT MAY BE CORRECTED BY THE COURT AT ANY TIME PURSUANT TO RULE 36 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE SIMPLY BY CHANGING THE WORD
(25)

"GUILTY" TO "NOT GUILTY".

C. THE PETITIONER IS ACTUALLY INNOCENT OF THE CRIME OF RICO CONSPIRACY. HIS CONVICTION AND SENTENCE IS INCONSISTENT WITH THE RUDIMENTARY DEMANDS OF FAIR PROCEDURE, AND, UNLESS THIS COURT DECLARES THAT THE VERDICT SHOULD BE SET ASIDE, A MANIFEST INJUSTICE WILL CONTINUE TO OCCUR.

THE PETITIONER REASSERTS AND INCORPORATES HEREIN THE ENTIRETY OF HIS ARGUMENTS IN SUB-SECTIONS (A) AND (B) ABOVE. TO THE EXTENT THAT SAID ARGUMENTS WERE NOT PREVIOUSLY RAISED, THE PETITIONER ASSERTS THE PROCEDURAL DEFAULT EXCEPTION OF ACTUAL INNOCENCE, AS RECOGNIZED IN BOUSLEY V. UNITED STATES, 523 U.S. 614, 622, 140 L. ED. 2d 828, 118 S. CT. 1604 (1998). SEE ALSO, UNITED STATES V. RATIGAN, 351 F.3d 957, 964-965 (9TH CIR. 2003) (IMALKING, IN § 2255 APPEAL, THAT ACTUAL INNOCENCE EXCEPTION WOULD APPLY IN

(26)

FEDERAL BANK ROBBERY CASE IF DEFENDANT COULD HAVE SHOWN, NOT ONLY THAT FDIC EVIDENCE AT TRIAL WAS INSUFFICIENT, BUT THAT BANK IN QUESTION IN FACT WAS NOT FDIC INSURED AT TIME OF CRIME).

UNLIKE RATIGAN, THE PETITIONER'S CASE IS NOT ONE OF EVIDENTIARY INSUFFICIENCY DUE TO MORE PROSECUTORIAL INADVERTENCE OR OVERSIGHT THAT COULD HAVE EASILY BEEN PREVENTED HAD THE PROPER QUESTION BEEN POSED. (IN RATIGAN, THE BANK WAS FDIC INSURED, A WITNESS TESTIFIED TO THAT FACT, BUT THE QUESTION WAS PHRASED IN THE PRESENT TENSE AT THE TIME OF TRIAL INSTEAD OF THE PAST TENSE AT THE TIME OF THE CRIME.). IN THE PETITIONER'S CASE, NO AMOUNT OF REPHRASING OR ADDITIONAL QUESTIONING COULD HAVE CHANGED THE FACT THAT, UNDER THE LAW, THE EVIDENCE WAS INSUFFICIENT TO PROVE GUILT. NO UNDERLYING STATE CRIMES OCCURRED, AND EVEN IF THE TEXT OF THE STATUTE (e.g., "CHARGEABLE UNDER STATE LAW") COULD BE CONSTRUED TO INCLUDE FEDERAL ENCLAVE COMMISSIONS, THE SINGLE STATE LAW MURDER CONSPIRACY COULD NOT BE SPLIT INTO TWO OR MORE NECESSARY PREDICATES.

CONSEQUENTLY, BECAUSE THE EVIDENCE WAS SO LACKING, AND BECAUSE NO POST-TRIAL ALTERATION OF WHAT ACTUALLY OCCURRED WOULD CHANGE THE EQUATION, THE

PETITIONER IS ACTUALLY INNOCENT OF VIOLATING THE RICO CONSPIRACY STATUTE AND IT WOULD BE A MISCARriage OF JUSTICE TO REFUSE TO OVERTURN HIS CONVICTION ON A MERE PROCEDURAL DEFAULT OVER WHICH HE HAD NO CONTROL IN THE FIRST PLACE.

D. TRIAL COUNSEL'S FAILURE TO MOVE UNDER RULE 29 FOR A JUDGMENT OF ACQUITTAL DEPRIVED THE PETITIONER OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT AND EXCUSES ANY PROCEDURAL DEFAULT FORFEITURE OR WAIVER.

DEFENSE COUNSEL'S FAILURE TO MOVE FOR A JUDGMENT OF ACQUITTAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL IF THAT MOTION WOULD HAVE BEEN SUCCESSFUL. SEE, E.G., UNITED STATES V. WATTS, 532 F. SUPP. 354 (D.D.C. 1981).

THIS ISSUE REQUIRES VERY LITTLE ELABORATION AND ESSENTIALLY COMES DOWN TO WHETHER OR NOT THE INSUFFICIENCY OF EVIDENCE ARGUMENTS PRESENTED IN THIS § 2255 MOTION HAVE MERIT AND WOULD HAVE REQUIRED

(28)

A JUDGMENT OF ACQUITTAL AT TRIAL HAD A RULE 29 MOTION BEEN MADE. THE PETITIONER RESPECTFULLY SUBMITS THAT SUCH A MOTION, IF MADE, WOULD HAVE, OR AT THE VERY LEAST SHOULD HAVE, RESULTED IN HIS ACQUITTAL AND THAT TRIAL COUNSEL'S OMISSION IN THAT REGARD NECESSARILY CONSTITUTES INEFFECTIVE ASSISTANCE.

E. APPELLATE COUNSEL'S FAILURE TO NOTICE OR ARGUE THE ISSUES PRESENTED HEREIN, WHILE ARGUING MUCH WEAKER, EVEN FRIVOLOUS ONES INSTEAD, RESULTED IN A DENIAL OF THE PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL, THUS EXCUSING ANY PROCEDURAL FORFEITURE OR WAIVER.

WHEREAS THE ALLEGATION OF TRIAL COUNSEL'S INEFFECTIVENESS IS MORE OR LESS LIMITED TO THE SINGLE RULE 29 OMISSION (SIMPLY BECAUSE THAT MOTION, IF MADE ON THE GROUNDS HEREIN SUBMITTED, WOULD HAVE
(29)

REQUIRED A JUDGMENT OF ACQUITTAL), THE STORY OF APPELLATE COUNSEL'S PREJUDICIAL PERFORMANCE IS COMPREHENSIVE AND COMPELLING.

IN ACCORDANCE WITH THE NINTH CIRCUIT'S ASSESSMENT-FORMULA (THAT A PETITIONER MAY ESTABLISH CONSTITUTIONALLY INADEQUATE PERFORMANCE IF HE SHOWS THAT APPELLATE COUNSEL OMITTED SIGNIFICANT AND OBVIOUS ISSUES WHILE PURSUING ISSUES THAT WERE CLEARLY AND SIGNIFICANTLY WEAKER [SEE BROYLES V. LEWIS, 1995 U.S. APP. LEXIS 25878 (9TH CIR.) (CITING MAYO V. HENDERSON, 13 F.3d 528, 533 (2d CIR. 1994))]), A COMPARISON OF THE ISSUES ON APPEAL, TO THOSE ALLEGED HEREIN, IS IN ORDER. AND TO THIS END, A MORE EFFECTIVE AND INVALUABLE AID THAN THE NINTH CIRCUIT'S OWN OPINION COULD HARDLY BE ENVISIONED.

THE PETITIONER'S DIRECT APPEAL IS PUBLISHED AS UNITED STATES V. SCOTT, 642 F.3d 791 (9TH CIR. 2011). WITH REGARD TO THE RELATIVE WEARINESS OF THE ISSUES THERE PRESENTED, IN COMPARISON TO THESE RAISED HEREIN, THE FOLLOWING EXCERPTS ARE REVEALING:

RP

SCOTT SEEKS TO OVERTURN THE JURY'S
VERDICT BECAUSE THE DISTRICT COURT
(30)

ABUSED ITS DISCRETION IN LIMITING VOIR DIRE AND CROSS-EXAMINATION, IN PROHIBITING JUROR NOTE-TAKING, IN REFUSING CERTAIN JURY INSTRUCTIONS, AND IN FAILING TO MAKE A PRELIMINARY DETERMINATION ON THE ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS. SCOTT ALSO CLAIMS THAT THE JUDGE ENGAGED IN MISCONDUCT THROUGH HIS INTERRUPTIONS AND DEMEANING REMARKS AIMED AT DEFENSE COUNSEL.

COURT'S RESPONSE TO VOIR DIRE ARGUMENT:

IN THE QUESTIONNAIRE AND DURING VOIR DIRE, THE PROSPECTIVE JURORS WERE ASKED ABOUT RACIAL BIASES AND WHETHER THEY FELT THEY COULD NOT BE IMPARTIAL. THE QUESTIONS SCOTT PROPOSED WERE EITHER REPETITIVE OF THESE QUESTIONS OR COULD HAVE ADDED "FUEL TO THE FLAMES" IN SUGGESTING THE PRESENCE OF CONTROVERSIAL ISSUES. (CITATION OMITTED). WE ARE SATISFIED THAT THE DISTRICT COURT HERE PROPERLY EXERCISED ITS DISCRETION.

COURT'S RESPONSE TO
CROSS-EXAMINATION ARGUMENT:

ON MOST OCCASSIONS, SCOTT WAS ABLE TO ELICIT TESTIMONY FROM THE WITNESS REGARDING RACIAL SEGREGATION IN PRISON. THE QUESTIONS THAT THE DISTRICT COURT PREVENTED DEFENSE COUNSEL FROM ASKING WERE SIMPLY REPETITIVE OR FAR AFIELD OF THE ISSUES IN THE CASE. (CITATION OMITTED). ON ANOTHER OCCASION, DEFENSE COUNSEL'S QUESTIONS ON RACE WERE OUTSIDE THE SCOPE OF ANY TESTIMONY ON DIRECT EXAMINATION. WE HAVE PREVIOUSLY NOTED THAT THE DISTRICT COURT "IS RESPONSIBLE FOR DETERMINING THE RELEVANCE OF A GIVEN TOPIC AND THE EXTENT OF CROSS-EXAMINATION TO BE PERMITTED ON THAT TOPIC." (CITATION OMITTED). IN PROHIBITING SUCH QUESTIONING ON A FEW OCCASIONS, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION. (CITATION OMITTED)

COURT'S RESPONSE TO
JUROR NOTE-TAKING ARGUMENT:

THE DISTRICT COURT HAS VERY BROAD
(32)

DISCRETION IN DECIDING WHETHER TO
ALLOW NOTE-TAKING, AND IF PROPERLY
EXERCISED THAT DISCRETION HERE.

COURT'S RESPONSE TO
JURY INSTRUCTION ARGUMENT:

SCOTT DID NOT PRESENT OR RELY UPON THE
MUTUAL COMBAT THEORY AT TRIAL AND,
THUS, THERE WAS NO ERROR IN THE
DISTRICT COURT'S FAILURE TO GIVE THE
INSTRUCTION SUA SPONTE, MUCH LESS
PLAIN ERROR.



AS TO THE IMPERFECT SELF-DEFENSE
INSTRUCTION, THERE WAS ALSO NO EVIDENCE
IN THE RECORD TO SUPPORT SUCH AN
INSTRUCTION:



SIMILARLY, SCOTT ARGUES THE DISTRICT
COURT VIOLATED FEDERAL RULE OF CRIMINAL
(33)

PROCEDURE 30(b) BY FAILING TO PROVIDE HIS ATTORNEY WITH THE JURY INSTRUCTIONS EARLIER, THUS PREVENTING HIS ATTORNEY FROM INTELLIGENTLY FORMULATING HER CLOSING ARGUMENT. EVEN ASSUMING THE DISTRICT COURT FAILED TO COMPLY WITH RULE 30(b), SCOTT HAS NOT SHOWN THAT HIS COUNSEL'S CLOSING ARGUMENTS WERE PREJUDICIALLY AFFECTED.

COURT'S RESPONSE TO ARGUMENT ON CO-CONSPIRATOR
STATEMENT ADMISSIBILITY DETERMINATION:

[W]E ARE SATISFIED FROM READING THE RECORD THAT THE DISTRICT COURT UNDERSTOOD IT WAS REQUIRED TO MAKE THE INITIAL DETERMINATION ABOUT THE EXISTENCE OF A CONSPIRACY THAT WOULD ALLOW FOR THE ADMISSION OF CO-CONSPIRATOR STATEMENTS.

COURT'S RESPONSE TO
JUDICIAL MISCONDUCT ARGUMENT:

ALTHOUGH MANY OF THE JUDGE'S COMMENTS AND INTERVENTIONS WERE INCONSISTANT WITH STANDARDS OF JUDICIAL DECORUM,

WE NEVERTHELESS CONCLUDE THAT THEY DID NOT RISE TO A LEVEL THAT REQUIRES REVERSAL.

IN LIGHT OF THE DISTRICT COURT JUDGES' EXTENSIVE CURATIVE INSTRUCTIONS, THE STRENGTH OF THE EVIDENCE OF SCOTT'S GUILT ON THE OFFENSES FOR WHICH HE WAS CONVICTED, AND THE JURY'S INDEPENDENCE IN REJECTING FIVE OF THE ALLEGED PREDICATE ACTS, WE CONCLUDE THAT SCOTT WAS NOT PREJUDICED BY ANY IMPROPER CONDUCT ON THE JUDGES' PART, EITHER INDIVIDUALLY OR IN THE AGGREGATE.

APPELLATE COUNSEL ALSO RAISED VARIOUS SENTENCING ISSUES, ALL OF WHICH THE COURT REJECTED.

CONSEQUENTLY, JUST FROM THE NINTH CIRCUIT'S WRITTEN DECISION IT IS OBVIOUS THAT THE ISSUES APPELLATE COUNSEL DID PURSUE WERE CLEARLY AND SIGNIFICANTLY WEAKER THAN THE PETITIONERS' ARGUMENT HEREIN REGARDING THE INSUFFICIENCY OF THE

EVIDENCE (WHICH ARGUMENT, CONTAINED IN SUB-SECTIONS (A) AND (B) ABOVE, IS INCORPORATED INTO THIS ARGUMENT BY REFERENCE). BUT THERE ARE ADDITIONAL REASONS, NOT APPARENT FROM THE PUBLISHED DECISION, WHICH FURTHER DEMONSTRATE THE OVERALL INEFFECTIVENESS OF APPELLATE COUNSEL.

FIRST, JUST A QUICK GLANCE AT APPELLATE COUNSEL'S OPENING BRIEF REVEALS OVER 170 GLARING MISSPELLINGS OR TYPOGRAPHICAL ERRORS, NOT TO MENTION SEVERAL PASSAGES THAT ARE WHOLLY GRAMMATICALLY INDECIPHERABLE. TAKE THE LAST LINE OF PARAGRAPH 2 ON PAGE 74, FOR EXAMPLE:

WITNESSES, TO THE ORDERS TO KILL
D.C. BLACKS WHERE IS AOB
IS THIS?).

OR THE FIRST SENTENCE OF PARAGRAPH 3 ON PAGE 111:

IN DETERMINING PREJUDICE SUFFERED
BY APPELLANT, IT IS IRRELEVANT THAT
THE REQUESTED INSTRUCTION WAS
"FAULTY," THE GOVERNMENT'S
CHARACTERIZATION OF THE APPELLANT'S

REQUEST IN WRIGHT, SUPRA 280

OF COURSE IT IS POSSIBLE THAT THE VERSION OF THE OPENING BRIEF THAT COUNSEL SENT TO THE PETITIONER WAS ONLY A RAUGH DRAFT (IT CERTAINLY HAS THAT APPEARANCE), BUT THIS IS A MATTER THAT CAN EASILY BE ASCERTAINED EXAMINING THE RECORD. AND IF IT TURNS OUT TO BE THE CASE THAT THE OPENING BRIEF COUNSEL SENT TO THE PETITIONER WAS THE SAME ONE SHE FILED WITH THE NINTH CIRCUIT, THERE CAN BE ABSOLUTELY NO EXCUSE FOR SUCH SHODDINESS.

AND BEYOND THE FACT THAT APPELLATE COUNSEL'S WORK PRODUCT IS RIDDLED WITH NUMEROUS TYPOGRAPHICAL AND GRAMMATICAL ERRORS THAT BESPEAK A COMPLETE LACK OF RESPECT FOR THE ESTEEMED JUDGES OF THE COURT OF APPEALS, MUCH OF THE BRIEF'S SUBSTANCE WAS TOTALLY IRRELEVANT. A CASE IN POINT IS THE INSTRUCTION ISSUED RAISED BY APPELLATE COUNSEL AS TO IMPERFECT SELF-DEFENSE WHICH, AS THE NINTH CIRCUIT NOTED "SCOTT ASSERTED... IN RELATION TO HIS STABBING OF ERVING BOND IN THE SHOWER." BUT AS THE SPECIAL VERDICT FORM MADE CLEAR, THE JURY CONCLUDED THAT THE ERVING BOND INCIDENT WAS UNRELATED TO THE RICO CONSPIRACY CHARGE, SO THE FAILURE TO GIVE THE INSTRUCTION WAS A NON-ISSUE.

THE BOTTOM LINE IS BEYOND DISPUTE:
THE INSUFFICIENCY OF THE EVIDENCE ARGUMENTS IN THIS
§ 2255 MOTION ARE MUCH STRONGER THAN THE ISSUES
RAISED BY APPELLATE COUNSEL AND, HAD THEY BEEN
RAISED INSTEAD OF THOSE THAT WERE THERE IS NO DOUBT
BUT THAT THE NINTH CIRCUIT WOULD HAVE GRANTED THE
APPEAL AND DIRECTED THIS COURT TO ENTER A JUDGMENT
OF ACQUITTAL, WITH THE ULTIMATE EFFECT BEING THAT
NO RETRIAL COULD OCCUR. BECAUSE APPELLATE COUNSEL'S
PERFORMANCE WAS UNREASONABLY DEFICIENT AND BECAUSE SUBSTANTIAL
PREJUDICE TO THE PETITIONER ENSUED THEREFROM, THE
PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL ON
APPEAL AND HE SHOULD THEREFORE BE EXCUSED FROM ANY
PROCEDURAL DEFAULT THAT MIGHT OTHERWISE PREVENT HIM FROM
PURSUING HIS INSUFFICIENCY OF EVIDENCE ARGUMENTS.

F. NOVELTY

TO THE EXTENT THAT THIS COURT FINDS THAT THE ARGUMENTS
HEREIN MAY HAVE BEEN SUFFICIENTLY NOVEL AS TO EXCUSE TRIAL
OR APPELLATE COUNSEL FROM RAISING THEM, THE PETITIONERS'
PROCEDURAL DEFAULT SHOULD BE EXCUSED ON THE BASIS
OF SUCH NOVELTY AS WELL.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attached herein:

(a) At a preliminary hearing: UNKNOWN

(b) At arraignment and plea: UNKNOWN

(c) At trial: AMY JACKS

(d) At sentencing: AMY JACKS

(e) On appeal: GRETCHEN FUSILIER, P.O. Box 305, CARLSBAD,
CA 92018

(f) In any post-conviction proceeding: N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court at approximately the same time?

☐ Yes

☒ No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☒ Yes

☐ No

(a) If so, give the name and location of the court which imposed sentence to be served in the future: _____

WESTERN DISTRICT OF MISSOURI

(b) Give the date and length of sentence to be served in the future: SENTENCE BEING SERVED
NOW; TOTAL OF 125 MONTHS; EXPIRES APPROXIMATELY 2016?

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed sentence to be served in the future?

☒ Yes

☐ No

WHEREFORE, movant prays that the court grant him all relief to which he may be entitled in this proceeding.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 27, 2012
Date

Steve J. Scott
Signature of Movant

CERTIFICATE OF MAILING

I, STEVE LOREN SCOTT, BY MY SIGNATURE BELOW, SWEAR UNDER PENALTY OF PERJURY THAT THREE (3) CONFORMED COPIES OF THE ATTACHED § 2255 MOTION TO VACATE WERE, THIS 3RD DAY OF OCTOBER, 2012, HANDED BY ME TO A FLORENCE USP-ADX UNIT TEAM OFFICIAL IN CHARGE OF ACCEPTING LEGAL MAIL TO BE PLACED IN THE FLORENCE USP-ADX OUTGOING LEGAL MAIL SYSTEM, WITH FIRST-CLASS, RETURN RECEIPT, CERTIFIED MAIL POSTAGE PREPAID, PROPERLY ADDRESSED TO:

CLERK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

312 NORTH SPRING STREET, ROOM G-8

LOS ANGELES, CA 90012

SWORN TO UNDER PENALTY OF PERJURY

BY Steve Loren Scott ON: OCTOBER 3, 2012

STEVE LOREN SCOTT

SS341-065

UNITED STATES PENITENTIARY-ADX

P.O. Box 8500

FLORENCE, CO 81226-8500

Name: STEVE LOREN SCOTT

Reg. No: 55341-065

U.S. PENITENTIARY MAX
P.O. BOX 8500
FLORENCE, CO 81226-8500

CERTIFIED MAIL

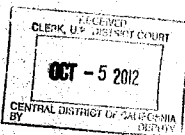


7011 3500 0000 4062 1396



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SPECIAL
Legal mail

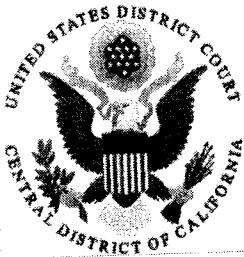


2255

Clerk, U.S. District Court
Central District of California
312 North Spring Street, Room G-8
Los Angeles, CA 90012

Administrative Maximum
P.O. Box 8500
Florence, CO 81226-0500

The enclosed letter was processed through special
mailing procedures for it pertaining to you. The letter
has been neither opened nor inspected. If the envelope
raises a question or problem over which this facility
has jurisdiction, you are urged to return this material
for further information or assistance in its processing.
Enclosures: none. The enclosed letter is being
returned to you as an enclosure to the letter
above.



TERRY NAFISI

District Court Executive
and Clerk of Court

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

WESTERN DIVISION

312 North Spring Street, Room G-8 Los
Angeles, CA 90012
Tel: (213) 894-7984

SOUTHERN DIVISION

411 West Fourth Street, Suite 1053
Santa Ana, CA 92701-4516
(714) 338-4570

EASTERN DIVISION

3470 Twelfth Street, Room 134
Riverside, CA 92501
(951) 328-4450

Thursday, October 11, 2012

STEVE LOREN SCOTT #55341-065
U.S. PENITENTIARY- MAX
P.O. BOX 8500
FLORENCE, CO 81226-8500

Dear Sir/Madam:

A ☐ Petition for Writ of Habeas Corpus was filed today on your behalf and assigned civil case number _____

A ☒ Motion pursuant to Title 28, United States Code, Section 2255, was filed today in criminal case number _____ and also assigned the civil case number **CV12- 8737 R**

A ☐ Motion for Extension of Time to File Habeas Corpus Petition was filed today on your behalf and assigned civil case number _____

Please refer to these case numbers in all future communications.

Please Address all correspondence to the attention of the Courtroom Deputy for:

☒ District Court Judge Manuel Real

☐ Magistrate Judge _____

at the following address:

☒ U.S. District Court
312 N. Spring Street
Civil Section, Room G-8
Los Angeles, CA 90012

☐ Ronald Reagan Federal
Building and U.S. Courthouse
411 West Fourth St., Suite 1053
Santa Ana, CA 92701-4516

☐ U.S. District Court
3470 Twelfth Street
Room 134
Riverside, CA 92501

The Court must be notified within fifteen (15) days of any address change. If mail directed to your address of record is returned undelivered by the Post Office, and if the Court and opposing counsel are not notified in writing within fifteen (15) days thereafter of your current address, the Court may dismiss the case with or without prejudice for want of prosecution.

Very truly yours,
Clerk, U.S. District Court

By: SBOURGEO
Deputy Clerk

EXHIBIT E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	CASE NO. CR 02-0938-R
	)	LACV 12-8737-R
Plaintiff,)	
)	
vs.	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO VACATE, SET ASIDE OR
STEVE LOREN SCOTT,	)	CORRECT SENTENCE BY A PERSON IN
	)	FEDERAL CUSTODY
Defendant.)	
)	

On October 6, 2006, Defendant Steve Loren Scott ("Defendant") was convicted of a Title 18 U.S.C. § 1962(d) Racketeer Influenced and Corrupt Organizations ("RICO") conspiracy charge for conspiring to murder two people, while he was incarcerated in a Federal prison. Defendant's Motion to Vacate, Set Aside, Correct Sentence ("Defendant's Motion"), CR 02-938-R, ECF No. 6,978, p. 2. Defendant's conviction was affirmed by the Ninth Circuit Court of Appeals on June 8, 2008. *Id.* at 3; *see also* ECF No. 6,936. Defendant also filed a petition to appeal the matter to the United States Supreme Court, but his petition was denied on October 11, 2011. Defendant's Motion, p. 3.

Now, Defendant moves to vacate, set aside or correct his sentence, pursuant to Title 28 U.S.C § 2255, on the following grounds: (1) "[t]he predicates upon which the verdict rests do not satisfy RICO's statutory definition of 'racketeering activity' under 18 U.S.C. § 1961(1)(A)" (*id.* at

6); (2) “[t]he three state murder conspiracy acts upon which the verdict depends were but a single conspiracy to murder . . . therefore, the evidence was insufficient to prove that the petitioner agreed that a ‘pattern’ of racketeering would take place” (*id.* at 18); (3) “[Defendant] is actually innocent of the crime of RICO Conspiracy” (*id.* at 26); (4) “[t]rial counsel’s failure to move under [R]ule 29 for a judgment of acquittal deprived the petitioner of his right to effective assistance of counsel in violation of the Sixth Amendment and excuses any procedural default[,] forfeiture[,] or waiver” (*id.* at 28); and (5) Appellate counsel’s failure to notice or even argue the issues presented [in the instant motion] . . . resulted in denial of [Defendant’s] rights under the Fifth and Sixth Amendments to effective assistance of counsel on appeal, thus excusing any procedural forfeiture or waiver” (*id.* at 29). As discussed below, the Court rejects each of Defendant’s contentions.

(1) The Predicates Upon Which the Verdict Rests Satisfy RICO’s Definition of Racketeering Activity

Defendant’s first argument, that the predicate offenses do not satisfy RICO’s definition of racketeering activity, evidences a fundamental misunderstanding concerning what the Government must prove to establish a RICO conspiracy. “‘Racketeering activity’ means [] any act or threat involving murder . . . which is chargeable under State law and punishable by imprisonment for more than one year[.]” Title 18 U.S.C.S. § 1961. In this matter, Defendant is not disputing that the jury found he conspired to commit two murders. Instead, he contends that even if the murders had been committed, he could not have possibly been charged under any State law because the murders would have taken place “wholly and exclusively within the Territorial jurisdiction of a United States Penitentiary.” Defendant’s Reply, ECF No. 7,003, p. 8.

However, impossibility is not a defense to a conspiracy charge. In order to obtain a conviction for RICO conspiracy, the Government does not need to prove that the Defendant committed or agreed to commit two predicate acts himself, or even that any overt acts have been committed. *See Salinas v. United States*, 522 U.S. 52, 63, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997) (“There is no requirement of some overt act or specific act in the statute before us.”). In fact, the Supreme Court has held:

One can be a conspirator by agreeing to facilitate only some of the

1 acts leading to the substantive offense. It is elementary that a
2 conspiracy may exist and be punished whether or not the substantive
3 crime ensues, for the conspiracy is a distinct evil, dangerous to the
4 public, and so punishable in itself.

5 *Id.* at 65; *see also United States v. Feola*, 420 U.S. 671, 693, 95 S. Ct. 1255, 43 L. Ed. 2d 541
6 (1975) (discussing the values served by conspiracy law, including “protection of society from the
7 dangers of concerted criminal activity”). The Ninth Circuit has further held that a conspiracy
8 conviction may be sustained even where the goal of the conspiracy is impossible. *See, e.g.,*
9 *Rodriguez*, 360 F.3d 949, 957 (9th Cir. 2004) (where “the conspiracy arose out of a federal law
10 enforcement sting operation, . . . the nonexistent status of the target drug traffickers [was]
11 inapposite” because “[i]mpossibility is not a defense to [a] conspiracy charge”); *United States v.*
12 *Bosch*, 914 F.2d 1239, 1241 (9th Cir. 1990) (rejecting the defendant’s argument that, because the
13 undercover agent never actually possessed cocaine, it was “legally impossible . . . to conspire to
14 aid and abet a nonexistent offense”); *United States v. Everett*, 692 F.2d 596, 599 (9th Cir. 1982)
15 (rejecting the defense of legal impossibility to a conspiracy charge where the conspiracy was with
16 an undercover agent).

17 The verdict form in Defendant’s underlying trial made sufficiently clear that the jury was
18 only required to find that “defendant agreed that two or more acts of racketeering activity would
19 be committed by some member or members of the conspiracy.” Plaintiff’s Opposition, ECF No.
20 6,999, Ex.1, p. 1. The fact that prosecution for the two murders under State law in this case may
21 have been a legal impossibility is inapposite. Therefore, Defendant’s conviction must be upheld
22 as it furthers the goal of conspiracy law to address the “distinct evil” of a conspiracy to engage in a
23 criminal enterprise. *Salinas*, 522 U.S. at 67.

24 **(2) The Evidence Was Sufficient to Prove That the Defendant Agreed That a Pattern of**
25 **Racketeering Would Take Place**

26 Defendant contends that the two acts of murder he conspired to commit constitute
27 insufficient evidence of a pattern of racketeering because the agreement is only one conspiracy.
28 Defendant’s Reply, ECF No. 7,003, p. 36-37 (“[E]ven if a hundred altogether, [the acts involving
murder] were only chargeable under State law and punishable one time as unit within a single

1 State murder conspiracy charge.”). However, Defendant cites no authority for his conclusory
2 proposition that each conspiracy would not be separately chargeable and punishable under State
3 law. As stated above, “racketeering activity” includes any act or threat involving murder which is
4 chargeable under State law and punishable by imprisonment for more than one year. *See* Title 18
5 U.S.C.S. § 1961. And a pattern of racketeering activity "requires at least two acts of racketeering
6 activity." *Id.* § 1961(5). Here, the jury found that each conspiracy to commit murder constituted
7 an act of racketeering, and two such acts make a pattern of racketeering activity. Thus, the
8 evidence was sufficient to prove that Defendant agreed that a pattern of racketeering would take
9 place.

10 **(3) Defendant Has Not Met His Burden of Establishing Actual Innocence**

11 Defendant contends that he is actually innocent because, as discussed above, (1) he could
12 not possibly have been charged under State law, and (2) his conspiracies to commit two murders
13 actually constitute one conspiracy. *See* Defendant’s Petition, p. 21. However, "[a]ctual
14 innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523
15 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). "To establish actual innocence,
16 petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no
17 reasonable juror would have convicted him." *Id.* (internal quotation marks and citation omitted).

18 Here, Defendant does not deny that he actually conspired to murder two people. And
19 Defendant does not object to any of the evidence presented at the time of trial or present new
20 evidence to this Court. Instead, he relies on his legal insufficiency claims discussed above, which
21 the Court rejects. Thus, Defendant has not met his burden of establishing actual innocence.

22 **(4) Defendant’s Ineffective Assistance of Counsel Claims Have No Merit**

23 Defendant contends that he received ineffective assistance at trial and during the course of
24 his appeal because his attorneys failed to raise the issues discussed above. In order to show that
25 counsel was ineffective, petitioner must demonstrate that (1) defense counsel's representation "fell
26 below an objective standard of reasonableness," and (2) counsel's deficient performance
27 prejudiced petitioner such that "there is a reasonable probability that, but for counsel's
28 unprofessional errors, the result of the proceedings would have been different." *Strickland v.*

1 *Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Here, the
2 contentions that Defendant complains about not being raised have no merit. Therefore, his
3 attorneys' refusals to raise the same were neither below an objective standard of reasonableness
4 nor prejudiced petitioner. For these reasons, Defendant's petition must be denied.

5 IT IS HEREBY ORDERED that Defendant's Title 28 U.S.C. § 2255 Motion to Vacate, Set
6 Aside, or Correct Sentence By a Person in Federal Custody is DENIED, and this action is
7 DISMISSED with prejudice.

8 Dated: June 5, 2013.

A handwritten signature in blue ink, appearing to read 'Real', is written over a horizontal line.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

EXHIBIT F

UNITED STATES DISTRICT COURT

1

1 UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

3 - - -

4 HONORABLE MANUEL L. REAL
UNITED STATES DISTRICT JUDGE PRESIDING

5 - - -

6 UNITED STATES OF AMERICA,)

7)

PLAINTIFF,)

8)

VS.) CR 02-938(A)R

9)

STEVEN LOREN SCOTT,)

10)

DEFENDANT.)

11 _____)

12
13
14 JURY TRIAL - DAY 7

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS
WEDNESDAY, OCTOBER 4, 2006
16 A.M. SESSION
LOS ANGELES, CALIFORNIA
17
18

19

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21

SHERI S. KLEEGER, CSR 10340
FEDERAL OFFICIAL COURT REPORTER
312 NORTH SPRING STREET, ROOM 402
LOS ANGELES, CALIFORNIA 90012
PH: (213)894-6604

24

25

UNITED STATES DISTRICT COURT

1 APPEARANCES OF COUNSEL:

2 ON BEHALF OF PLAINTIFF:

DEBRA W. YANG

3 UNITED STATES ATTORNEY

BY: JOEY BLANCH,

4 ASSISTANT UNITED STATES ATTORNEY

1100 UNITED STATES COURTHOUSE

5 312 NORTH SPRING STREET

LOS ANGELES, CA 90012

6

7 ON BEHALF OF DEFENDANT:

LAW OFFICES OF AMY JACKS

8 BY: AMY JACKS, ATTORNEY AT LAW

LOS ANGELES, CA 90012

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UNITED STATES DISTRICT COURT

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EXHIBIT

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UNITED STATES DISTRICT COURT

1 LOS ANGELES, CALIFORNIA; WEDNESDAY, OCTOBER 4, 2006

2 A.M. SESSION

3 - - -

4

5 MS. WRIGHT: This United States District Court is

6 now in session. The Honorable Manuel L. Real presiding.

7 THE CLERK: Item Number 1, CR 02-938(A)-R: United

8 States of America versus Steven Loren Scott.

9 Counsel, your appearances, please.

10 MS. BLANCH: Good morning, Your Honor.

11 Joey Blanch for the United States. Heather Jordan

12 is also present at counsel table.

13 MS. JACKS: Amy Jacks for Mr. Scott.

14 THE COURT: All right. You have the -- the charge

15 as I propose to give it.

16 And any objection by the Government to the charges

17 as I propose to give.

18 MS. BLANCH: Only, Your Honor, that it's my

19 understanding that you are going to give a general verdict

20 form, which is what the Government does request, and you have
21 included the special verdict form that the Government
22 originally requested, but we are withdrawing that request.
23 And we don't think there should be both.
24 THE COURT: Ms. Jacks, any objection from the
25 defendant.

UNITED STATES DISTRICT COURT

1 MS. JACKS: I have several objections.

2 First of all, the instructions, when I viewed them
3 just a few minutes ago for a period of approximately nine
4 minutes, aren't numbered -- not all of them are numbered, but
5 I think I took some notes. Let me see if I can state my
6 objections.

7 The instructions as to the elements of the offense,
8 the enterprise, the effect on interstate commerce, the
9 association, the RICO elements, the pattern of racketeering
10 activity are all what appear to be submitted by the
11 Government as these DOJ model instructions. I think I
12 previously stated that these instructions -- in writing that
13 these instructions are argumentative, they apply the facts to
14 the law, and they essentially put the Court in the position
15 of making the Government's argument. For those reasons I
16 object to all of those instructions.

17 I would request the special verdict form. I think
18 it is required that the jury be unanimous as to which
19 racketeering acts Mr. Scott conspired to commit, and because

20 there has been proof -- or attempts to prove numerous

21 racketeering acts, I think that --

22 THE COURT: Well, the conspiracy is RICO. The

23 conspiracy is RICO.

24 MS. JACKS: Right.

25 It's a conspiracy to violate --

UNITED STATES DISTRICT COURT

1 THE COURT: RICO.

2 MS. JACKS: -- the racketeering --

3 THE COURT: Yes.

4 MS. JACKS: -- clause.

5 THE COURT: And it starts at a time before, and all

6 of the overt acts by any of the -- of any of the defendants

7 are applicable to all defendants.

8 MS. JACKS: But in order for Mr. Scott to conspire

9 to commit them, the jury has to agree which ones he conspired

10 to commit.

11 I also object to the Court's circumstantial

12 evidence instruction in that it leaves out the -- part of the

13 circumstantial evidence instruction, which I think I included

14 in my reasonable doubt instruction about if there are two

15 reasonable --

16 THE COURT: No. That is not -- that is not the

17 law.

18 MS. JACKS: If there are --

19 THE COURT: That is state law. That is not the

20 law --

21 MS. JACKS: There --

22 THE COURT: -- in the Federal Courts.

23 MS. JACKS: I submitted the -- the O'Malley cite to

24 the circumstantial evidence instruction included in the

25 reasonable doubt instruction, and that is not included in the

UNITED STATES DISTRICT COURT

1 Court's.

2 THE COURT: All right.

3 MS. JACKS: Finally, the Court is instructing the
4 jury extensively on the crime of murder as it applies in
5 Colorado, in Missouri, and in California. I don't have the
6 instructions in front of me.

7 I would note that the Court has submitted or has
8 not provided the jury any instructions on defenses to murder,
9 and specifically the two instructions that I requested were
10 the defenses to murders recognized in California, Missouri,
11 and Colorado, and that is of intoxication as it applies to an
12 individual's intent and an individual's ability to
13 deliberate, and imperfect self defense. And in all of those
14 jurisdictions, if an individual acts with imperfect self
15 defense, that reduces the murder to a manslaughter, which
16 would not be a racketeering act.

17 THE COURT: No. The -- there is no evidence of
18 intoxication here upon which the jury could come to a
19 conclusion of intoxication, and there is no -- no evidence on

20 imperfect self defense.

21 MS. JACKS: I would simply note that there is
22 evidence that Mr. Scott was under the influence of
23 prescription medicine at the time he stabbed Mr. Bond, and
24 certainly based on the testimony of Dr. Khalil, that
25 medication could have affected his ability to deliberate as

UNITED STATES DISTRICT COURT

1 required by the Missouri --

2 THE COURT: There is no evidence that at the time
3 he committed those offenses that there -- that he was under
4 the influence of any drug.

5 MS. JACKS: I disagree. The evidence is to the
6 contrary.

7 I would also --

8 THE COURT: That would affect -- that would affect
9 his -- his intent.

10 MS. JACKS: I would also note that there is
11 evidence from which the jury --

12 THE COURT: His doctor -- doctor indicated he was
13 not an expert on Interferon.

14 MS. JACKS: I would also note that the record
15 includes evidence from which the jury would conclude -- could
16 conclude that on the morning of November 24th, 2000,
17 Mr. Scott acted under a belief -- he heard Mr. Bond
18 sharpening a knife. He was under --

19 THE COURT: There's no evidence that he heard

20 Mr. Bond sharpening any knife.

21 MS. JACKS: Witness Scott Cupples testified to that

22 exact thing, and I have notes, given the last --

23 THE COURT: Well, Mr. Cupples may have heard it,

24 but there's no evidence here that the defendant Scott heard

25 it.

UNITED STATES DISTRICT COURT

1 MS. JACKS: Well, I guess the record speaks for
2 itself.

3 THE COURT: Well, all right.

4 MS. JACKS: But I do believe there is evidence from
5 which that instruction -- for which that instruction is
6 appropriate --

7 THE COURT: All right.

8 MS. JACKS: -- and I believe the Court's failure to
9 give those instructions, coupled with the Court's giving
10 argumentative instructions that argue the Government's case
11 is denying Mr. Scott is violating his Constitutional
12 rights --

13 THE COURT: Oh, come on. Come on, Counsel.
14 Please.

15 MS. JACKS: -- and denying him due process of law.

16 THE COURT: Please don't keep doing that. That is
17 just silly talk.

18 MS. JACKS: Your Honor, I don't think the
19 Fourteenth Amendment --

20 THE COURT: Well --

21 MS. JACKS: -- to the United States Constitution is

22 silly talk, and I'm surprised to hear that from the bench.

23 THE COURT: There have been no violation of any

24 Constitutional rights here, Counsel, and you know it.

25 MS. JACKS: I know there has been.

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1 THE COURT: No. You have been arguing that to the
2 jury, and you know that that's improper.

3 All right. Bring down the jury.

4 Do you have another exhibit to offer?

5 MS. JACKS: I do. Actually, although it was
6 reported to have been delivered last night, it was delivered
7 this morning. And it -- I think we have -- I think your
8 clerk has requested that we mark that 316.

9 THE COURT: All right. Any objection.

10 MS. BLANCH: No, Your Honor.

11 THE COURT: 316 in evidence.

12 (Exhibit Number 316 admitted into evidence.)

13 MS. JACKS: And, Your Honor, there was one
14 stipulation about the inmate history quarters that we had
15 requested that the Court read to the jury. I would reiterate
16 that request and ask the Court to do that.

17 THE COURT: Which? Which?

18 MS. JACKS: We found that last night.

19 Thank you. It's Government's Exhibit 150.

20 THE COURT: There it is.

21 (The following was held in the presence of the

22 jury.)

23 THE COURT: All right. Let the record show the

24 jury is present and in their proper places. The defendant is

25 present with his counsel.

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1 All right. There is one -- one stipulation that
2 has to be read to you. And that is an agreement between the
3 Government and the defendant that:

4 The Federal Bureau of Prisons keeps records of
5 where each inmate is housed. These records are called the
6 Inmate Quarters Histories. How detailed the Inmate Quarters
7 Histories are depends on the record keeping requirements at
8 the time for each institution. For example, sometimes an
9 Inmate Quarters History will detail the exact cell in which
10 an inmate was housed. At other times an Inmate Quarters
11 History will detail only the cell block or the institution
12 where the inmate was housed.

13 The United States Medical Center for Federal
14 Prisoners in Springfield, Missouri, does not keep records of
15 the cell assignments of inmates housed in Unit 21 E. The
16 Bureau of Prisons has searched for records of the actual cell
17 assignment but cannot find such records.

18 During the course of this trial the Inmate Quarters
19 Histories for a number of inmates will be introduced -- has

20 been introduced. These records are true and accurate copies
21 of the records maintained by the Federal Bureau of Prisons,
22 and the parties stipulate that they may be introduced into
23 evidence without further foundation.
24 And that's it. That's Exhibit 316, and that has
25 been -- has been received in evidence.

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1 All right. Call your next witness, Ms. Jacks.

2 MS. JACKS: Your Honor, I think we finished with

3 witnesses and we have, outside the presence of the jury,

4 admitted various items of evidence.

5 THE COURT: Does the defense now rest?

6 MS. JACKS: We do.

7 THE COURT: Any rebuttal.

8 MS. BLANCH: No, Your Honor.

9 THE COURT: We will hear your opening summation.

10 MS. BLANCH: Good morning, ladies and gentlemen.

11 In order to convict Steve Loren Scott of Count II

12 in the indictment, which is conspiracy to violate the RICO

13 laws, the Government has to prove a number of things. The

14 Government has to prove first that the enterprise would be

15 established; that he agreed that the enterprise would affect

16 interstate commerce. We have to prove beyond a reasonable

17 doubt that the defendant agreed that he would be associated

18 with the enterprise. And lastly, we have to prove that the

19 defendant knowingly agreed to participate or conduct in the

20 affairs of the enterprise through a pattern of racketeering

21 activity.

22 Now, that sounds a little bit complicated; so I

23 want to talk to you a second about what the Government

24 doesn't have to prove. We don't have to prove that the

25 Aryan Brotherhood ever existed. We don't have to prove that

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1 this defendant ever actually did anything. We don't have to
2 prove that anyone in the Aryan Brotherhood ever actually did
3 anything.

4 What we have to prove is that this defendant agreed
5 with other members of the conspiracy that a racketeering
6 organization would be formed. We have to prove that this
7 defendant agreed that he would be associated with this future
8 enterprise. And we have to prove that this defendant agreed
9 that at some point in the future, some co-conspirator, some
10 member of the conspiracy, would commit two racketeering acts.
11 And in this case the racketeering acts are crimes involving
12 murder and crimes involving drug trafficking.

13 So everything else after that is just gravy.

14 We have gone a step further. We have proved that
15 the Aryan Brotherhood actually existed. I don't think there
16 is really any doubt about that. The Aryan Brotherhood
17 existed.

18 THE COURT: That is not relevant, Counsel.

19 MS. BLANCH: Thank you, Your Honor.

20 The evidence has shown that the Aryan Brotherhood
21 actually existed, and the evidence has shown that the Aryan
22 Brotherhood existed an a criminal organization; that the
23 purpose of that group was criminal.
24 I direct your attention to Government's Exhibit 1.
25 This is a document that was found in David Sahakian's cell.

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1 David Sahakian is a prominent member of the Aryan

2 Brotherhood.

3 I've highlighted just a few sections on this
4 document, which you are going to be able to see when you go
5 back to the jury room.

6 At the time this document was formed, the Aryan
7 Brotherhood was reorganizing their organization, and they put
8 in writing the purpose of the Aryan Brotherhood. They say,
9 "Our primary goal is to transform us from a dysfunctional
10 prison gang into a viable and productive criminal
11 organization inside prison and on the streets. The purpose
12 of this organization is to provide us with material and
13 monetary assets through illegal and legal activities."

14 If you go to the end, it says, "We are deserving of
15 more than just being just a broke, dysfunctional jailhouse
16 bully. This is about us becoming the very best possible
17 criminal organization.

18 Now, ladies and gentlemen, I submit to you that
19 this document alone proves that the Aryan Brotherhood was a

20 criminal organization and that they were organized. They had
21 a structure. They had governors, a commission, a council,
22 foot soldiers, and the goal of their organization was
23 criminal.
24 And you have heard evidence from individuals in
25 that organization who told you that the goals of that

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1 organization were drug trafficking, gambling, and acts of
2 violence, including acts of murder.

3 And the next thing, the Aryan Brotherhood exists as
4 a criminal organization. Was the defendant part of that
5 conspiracy? Did he agree to be part of that conspiracy?

6 Well, ladies and gentlemen, I submit to you that he did.

7 I'm going to show you Government's Exhibit 50.

8 This is a membership list found in the cell of the Tyler
9 Davis Bingham, one the commissioners of the Aryan
10 Brotherhood. If you look, right here it says Steve Scott
11 with his membership.

12 And you have heard evidence from members and
13 associates of the Aryan Brotherhood that shows you it is not
14 possible for the defendant to have become a member of the
15 Aryan Brotherhood without agreeing that that group would
16 commit drug trafficking crimes and without agreeing that that
17 group would commit acts involving murder.

18 Now, ladies and gentlemen, we don't have to prove
19 that those acts of drug trafficking and those acts of murder

20 ever actually happened. We just have to prove that the
21 defendant conspired with other members of the Aryan
22 Brotherhood and agreed that that would happen at some time in
23 the future. But we have proven it. We have proven what the
24 defendant agreed to by showing you evidence of his own
25 actions.

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1 First of all, let's talk about his agreement that
2 Benitez-Mendez -- Ismael Benitez-Mendez would be killed. On
3 January 6th, 1992, in Leavenworth, Ismael Benitez-Mendez was
4 stabbed with a knife in the back of his shoulder, neck area.

5 Who committed the stabbing? Steve Scott did, and
6 he did it on orders of the Aryan Brotherhood.

7 You have heard that it is a very fundamental basic
8 rule of the Aryan Brotherhood in prison that you may not lay
9 hands on a brother. Benitez-Mendez violated that rule by
10 laying his hand on Red Lollar, and Tyler Davis Bingham gave
11 Steve Scott the order to teach him a lesson and stab him with
12 the intent to commit murder, and Steve Scott did that. And
13 you have heard evidence from members of the Aryan Brotherhood
14 who said they spoke to Steve Scott, and he personally told
15 them that he did it.

16 In fact, Mr. Kelly told you that he had a
17 conversation with Steve Scott on the yard where Mr. Kelly was
18 complaining that whoever stabbed this guy didn't do a better
19 job because he lived. And Steve Scott's response was, "Well,

20 I did my best."

21 Ladies and gentlemen, that, I submit, is an

22 admission that he intended to kill Ismael Benitez-Mendez.

23 What about Jimmy Lee Inman? He was stabbed on the

24 rec yard on September 30th, 1993, at the United States

25 Penitentiary at Marion. Steve Scott was there. He was a

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1 member of the Aryan Brotherhood. And you heard testimony
2 from Jimmy Lee Inman himself, who talked about why he was in
3 the hat with the Aryan Brotherhood and the Aryan Brotherhood
4 tried to kill him. And you heard testimony from Kevin Roach,
5 who told you that Steve Scott himself provided the knife so
6 that Kurt King could stab Jimmy Lee Inman and try to kill
7 him.

8 Let's talk about the war with the D.C. Blacks.
9 There specifically you have hard physical evidence that this
10 defendant agreed that members of his conspiracy, members of
11 the Aryan Brotherhood would commit acts involving murder.

12 Let's look at the evidence in his own handwriting.

13 This is Government's Exhibit 2-C.

14 Now, remember at the time the defendant was at the
15 A.D.X., the super-max penitentiary, and he was a counselor in
16 the Aryan Brotherhood. And you have heard evidence about
17 what that means. The counselor is one of the leaders. He is
18 in charge of formulating policy and instructing other members
19 of the Aryan Brotherhood who come on his tier about what is

20 going on in the gang and what they are supposed to do.

21 Lawrence Klaker was a member of the Aryan

22 Brotherhood. He came on Steve Scott's tier, and acting in

23 line with his responsibilities as a counselor in the Aryan

24 Brotherhood, Steve Scott sent him a series of handwritten

25 notes. And in his own handwriting you can see what he said

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1 to Lawrence Klaker. He says, "I don't know how much you
2 know; so just bear with me. I give it to you a little at a
3 time." And then he says, "We are at onsite war with the
4 D.C. toads. Are there any on the tier? I have a nail and
5 plank down here."

6 He is telling Lawrence Klaker that the Aryan
7 Brotherhood is at onsite war with the D.C. Blacks. On site
8 war, as you have heard, means anytime you get in the same
9 physical space as a D.C. Black, it is your job as an Aryan
10 Brotherhood to kill that member of the rival gang.

11 Now, ladies and gentlemen, you have heard some
12 evidence that the D.C. Blacks weren't a nice group of people.
13 I'm not trying to say that they were. But war takes two
14 sides, and the Aryan Brotherhood has gone to war with the
15 D.C. Blacks. And this man, the defendant, Steven Scott, was
16 in favor of that war, he agreed with that war, and he even
17 passed on the messages to other members of the Aryan
18 Brotherhood that if they could, they should take their
19 prison-made weapons, which is referred to here as a nail and

20 plank, and kill members of that rival gang.

21 He even passes on information about what's happened

22 in the war already. He said, "Three toads bumped in

23 Lewisburg." Well, ladies and gentlemen, you have heard

24 evidence about what actually happened in Lewisburg. Members

25 of the Aryan Brotherhood got word that they were to go to war

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1 with the D.C. Blacks, and they broke out of their cells, and

2 they killed two members of the D.C. blacks at Lewisburg.

3 Here Steve Scott got it wrong. He said three were

4 killed, but he's passing the message about what happened in

5 that war. He says, "Jesse stabbed a D.C. eight times in

6 G Block." Well, you know that happened. Jesse Van Meter

7 stabbed a D.C. Black named Wardell Hillard on G Block at the

8 A.D.X.

9 And then he gives a little more information. Here

10 the members at the A.D.X. of the Aryan Brotherhood -- Kevin,

11 that is Kevin Roach -- he was the head counselor at the time.

12 John, that's John McGinley, he was the counselor in charge of

13 security. And he goes on, and he gives more information. So

14 that new member of the Aryan Brotherhood on the tier knows

15 what is going on in their criminal organization.

16 Let's look in his own writing at Exhibit 3-C. He

17 says, "If you wrap your nail in a plank in carbon paper, you

18 might beat an X ray." Well, you know he actually did that.

19 He wrapped his prison-made weapon in carbon paper, secreted

20 it in his rectum, and later on you have seen that on
21 January 30th, 1998, Steve Scott was found with a weapon
22 wrapped in carbon paper, secreted in his rectum.
23 He goes on to talk about how to make weapons. He
24 talks about how you can get pieces of metal out of the rec
25 cages. And you have heard evidence from members of the

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1 Bureau of Prisons who were at the A.D.X. at the time that
2 after they got this note, they checked the rec cages, and
3 sure enough, inmates had been tampering with the rec cages
4 and had been using that metal to try and make weapons.

5 You see here a little more information. The toad
6 that Jesse stabbed is named Wardell. He is just from the
7 outskirts from D.C. who is way out of his league.

8 And again, ladies and gentlemen, you know that that
9 actually happened.

10 And other places in this kite shows you that the
11 defendant is a member of the Aryan Brotherhood. He refers to
12 other people who are members of the gang. He talks about
13 John; that's John McGinley. Mike W.; that's Mike Wagner.
14 Gato; you have heard evidence that Gato is Danny Weeks. All
15 of them are members of the Aryan Brotherhood. And he goes on
16 to say, "We are going trying to arm all brothers."

17 Ladies and gentlemen, that is his own handwriting
18 saying he is in favor of committing murder, and that's what
19 we have to prove. We have to prove that this defendant was a

20 member of the Aryan Brotherhood, that the Aryan Brotherhood
21 was a criminal enterprise, and that when he joined and during
22 the course of his participation in that conspiracy, he agreed
23 that at least two acts involving murder would occur. And
24 there you have it in his own handwriting.
25 Government's Exhibit 4, also in his own

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1 handwriting. It says, "John is going to try to move," and
2 then you can't read it for a second. And it says, "If they
3 let him out down there. But if he can't, you know the bottle
4 stoppers will be on it."

5 You have heard evidence that bottle stoppers is
6 Aryan Brotherhood code for correctional officer. It rhymes
7 with coppers.

8 He says, "They will know he had it in the happy
9 Easter."

10 Well, you have heard evidence that happy Easter
11 rhymes with keester. It's Aryan Brotherhood code for having
12 a knife concealed in your rectum.

13 I suggest to you that when you get back in the jury
14 room you spend some time looking at these kites and letters.
15 Look at Government's Exhibit 1 for the Aryan Brotherhood's
16 own definition of what they are all about.

17 And look at Government's Exhibits 2, 3, 4, and 5 as
18 handwritten evidence, written by the defendant, that shows he
19 is a member of the Aryan Brotherhood, it's a criminal

20 organization, and that he is all in favor of members of that
21 organization committing crimes, specifically crimes involving
22 murder.

23 I'm going to show you Government's Exhibit 6. He
24 has called it the party list. Once again, this is
25 handwritten proof. It was found in his cell. It is in his

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1 handwriting. This is a list of D.C. Blacks who were to be
2 killed at the A.D.X.

3 Now, how do you know this isn't just a list of just
4 people to be afraid of? Well, first of all, you heard
5 evidence of what the Aryan Brotherhood is all about. The
6 Aryan Brotherhood isn't afraid of anyone. They are an
7 offensive group. If they feel threatened they go on the
8 offensive and they figure out who their enemies are and they
9 make plans to kill them. And ladies and gentlemen, that is
10 illegal.

11 Also, how do you know it's not just a list of
12 people that he is afraid of? Well, look at the people that I
13 have highlighted. These are people at the A.D.X. who we have
14 other independent evidence that has come in this case that
15 the Aryan Brotherhood wanted to kill. Look at Wardell
16 Hillard. He was actually attacked. Willie Johnson,
17 nicknamed "Butch." You also have heard evidence that he has
18 a nickname "Prince," and you have seen, and you can look at
19 it in the jury room, a letter that says, "We don't know if we

20 are going to war yet, but Prince is a boy's name." And you
21 know that is code that Prince is on the hit list.
22 Beady Hinnit. You have seen evidence and you can
23 look at it when you go back in the jury room. The Napoleon
24 Bonaparte book. It is a coded message instructing Beady
25 Hinnit to be killed.

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1 Ladies and gentlemen, I submit to you that this is
2 evidence that the defendant is a member of the Aryan
3 Brotherhood and agreed that these people should be killed.
4 And ladies and gentlemen, that is what the Government has to
5 prove. We have to prove that he was a member of the Aryan
6 Brotherhood or agreed that he would be; that he agreed he
7 would be associated with the Aryan Brotherhood, and he was
8 according to this evidence; and we have to prove that he
9 knowingly agreed to conduct or participate, directly or
10 indirectly, in the conduct of the affairs of the enterprise
11 through a pattern of racketeering activity. And racketeering
12 activity, you will be instructed, means a pattern of two
13 crimes; that he agreed that two crimes would be committed,
14 either two crimes involving murder, two crimes involving drug
15 trafficking, or one of each.

16 How else do we know that this defendant agreed to
17 be part of the Aryan Brotherhood and agreed that people in
18 the Aryan Brotherhood would commit crimes involving murder?

19 Look at Irving Bond. I'm showing you Government's

20 Exhibit 9. This is a photograph of Irving Bond after the
21 defendant stabbed him in the chest. Now, you have to ask
22 yourselves, was Irving Bond a threat to Steve Scott as he was
23 being escorted to the showers with his hands shackled behind
24 his back? Or did Steve Scott conspire with Scott Cupples
25 long before he ever got out of his handcuffs -- got his

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1 handcuffs in front of him and used the shank to stab Irving

2 Bond?

3 Ladies and gentlemen, I submit that this is a crime

4 that he conspired to commit. He found out that there was an

5 enemy on his tier, he spoke to Scott Cupples about it, and

6 they came up with a plan. And Scott Cupples made shanks that

7 looked like this and gave them to the defendant for the sole

8 purpose of killing their enemies.

9 Now, you have heard some evidence that the

10 defendant was taking Interferon, and you heard some evidence

11 that at the time the defendant was grouchier than usual; he

12 was more irritable. But look at what he was doing before he

13 ever got to Springfield. This is a man who, as a counselor

14 in the Aryan Brotherhood, spoke to Richard Bernard through

15 the toilet pipes at the A.D.X., and instructed him, "These

16 are the people you are to kill." He told them -- he told

17 Richard Bernard, "We're at onsite war with the D.C. Blacks.

18 Here are the names of the people you are suppose to kill."

19 He told them the names of the people. Some of them you have

20 seen already on the party list.

21 And then he got to Springfield. And he was taking

22 Interferon, and maybe he got more irritable. But you have to

23 ask yourselves, is what he did at Springfield, what he

24 conspired to do at Springfield consistent with the plan to

25 kill D.C. Blacks that this defendant was already involved in

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1 before he ever got there? I submit that it is.

2 So once again, the defendant's own actions show
3 what he agreed the Aryan Brotherhood would do.

4 And I just want to remind you, we don't have to
5 prove that anyone in the Aryan Brotherhood ever actually did
6 anything, only that this defendant agreed that they would
7 commit those crimes. The evidence about Benitez-Mendez and
8 Inman and the war with the D.C. Blacks and the knife that he
9 had and his assault on Irving Bond, all of that is proof
10 about what he agreed would happen.

11 We don't actually have to prove that he committed
12 those crimes. What we have to prove is that he agreed that
13 someone would commit acts involving murder. And these crimes
14 are evidence about what he agreed would happen.

15 Let's look at John Gotti and Walter Johnson -- the
16 other Walter Johnson, Wakil. John Gotti was assaulted on the
17 yard at Marion. He put out a contract, and the Aryan
18 Brotherhood took it up. And you know who was one of the
19 Aryan Brotherhood members who was talking about how do we

20 kill Walter Johnson? How do we get this money from John
21 Gotti? We have to kill Wakil on site. It was the defendant.
22 You heard evidence from members of the Aryan Brotherhood who
23 were conspiring to kill Walter Johnson, and they said this
24 defendant participated in those conversations and passed the
25 word.

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1 Same with Frank Ruopoli. He was a cooperator, he
2 was in the hat, and this defendant instructed people, "Kill
3 him on site."

4 Let's talk about drug trafficking. How do you know
5 that when the defendant joined the Aryan Brotherhood
6 throughout his participation in this criminal organization
7 that he agreed the Aryan Brotherhood would commit crimes
8 involving drug trafficking? Well, first of all, you heard
9 from Eugene Bentley, who told you that while this defendant
10 was at Leavenworth he participated in the Aryan Brotherhood
11 drug trafficking crimes. He also told you that this
12 defendant participated in the Aryan Brotherhood involved in
13 gambling in the institution. And often drugs are used in
14 place of money when they are gambling.

15 You heard evidence that this defendant was promoted
16 to the head of the Aryan Brotherhood business department.
17 Well, where is the Aryan Brotherhood going to get money?
18 Ladies and gentlemen, there is no question, according to the
19 witnesses that you saw, that this defendant knew the Aryan

20 Brotherhood money would come from proceeds that would involve
21 drug trafficking.
22 Look at Government Exhibit 31, this is a \$105 money
23 order made out to this defendant. Where did the money come
24 from? It came from drug proceeds. You heard that from
25 Eugene Bentley, who told you that Sean Darcy is a friend of

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1 T.D. Bingham, and T.D. Bingham told Eugene Bentley that this
2 \$105 money order came as a distribution from drug trafficking
3 in the Aryan Brotherhood.

4 Look at -- when you get back to the jury room, look
5 at the evidence involving Mark Nyquist out on the street.
6 Look at the restaurant letter. Kevin Roach says, "Mark,
7 you're a real good cook. You should open up a restaurant."
8 And you heard Kevin Roach tell there was no restaurant; that
9 was the Aryan Brotherhood plan to get members out on the
10 street and to commit crimes involving drug trafficking and
11 send money back in to their members.

12 That is the plan that you can read about in the
13 Aryan Brotherhood mission statement found typed up in David
14 Sahakian's cell. And you can read that mission statement
15 back in the jury room as Government's Exhibit 1.

16 Ladies and gentlemen, RICO sounds a little
17 intimidating. It can be a complicated law. But when you
18 look at the instructions that the Court is going to give you,
19 you'll see that the Government really has to prove very few

20 things; that an enterprise would be established and that the

21 defendant agreed that an enterprise would be established.

22 And ladies and gentlemen, we have gone way beyond

23 that. We have shown you that the Aryan Brotherhood actually

24 exists.

25 Second, that the enterprises or its activities

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1 would affect interstate commerce. Well, what does that mean?

2 It means they use the telephone or they used the mail system.

3 If you find that the Aryan Brotherhood used the telephone or

4 used the mail in order to conduct their affairs, that you can

5 find effected interstate commerce.

6 Third, that the defendant agreed he would be

7 associate with the enterprise. Again, we have gone beyond

8 that. He didn't just agree that he would be associated; he

9 is one of their leaders. He was head of the business

10 department, and then he became a counselor. As one of the

11 few counselors in the Aryan Brotherhood, he was in charge of

12 conducting the Aryan Brotherhood's activity.

13 And fourth, that he knowingly agreed to conduct or

14 participate, directly or indirectly, in the conduct of the

15 affairs of the charged enterprise through a pattern of

16 racketeering activity.

17 Ladies and gentlemen, the evidence has shown it is

18 not possible for the defendant to have joined the Aryan

19 Brotherhood thinking it was just a social organization. It's

20 simply not possible. When he joined the Aryan Brotherhood,
21 he knew it was a criminal organization; he knew that members
22 of that organization were going to be conducting crimes
23 involving drug trafficking and involving murder. And that's
24 what pattern of racketeering activity means. Did he agree
25 that someone at some point over the course of the conspiracy

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1 commit two crimes involving drugs, two crimes involving
2 murder, or one of each?

3 And ladies and gentlemen, I suggest to you that
4 when you go back into the jury room and you look at the
5 evidence, read the mission statement, look at the kites he
6 sent in his own handwriting, look at the hit list we found in
7 his cell, and you will conclude that beyond a reasonable
8 doubt, the defendant is guilty of conspiring to violate the
9 RICO laws, and I ask that you will find him guilty.

10 Thank you.

11 THE COURT: Okay. Your summation, Ms. Jacks.

12 MS. JACKS: Thank you.

13 Good morning, ladies and gentlemen.

14 I said at the beginning of this trial the trial is
15 to be the supposed to be the search for the truth, and the
16 purpose of the trial is for you, the jury, to arrive at a
17 verdict that reflects truth and that reflects justice.

18 It's not always an easy task, but I think you have
19 three things to help you. You have the evidence, the

20 testimony that you have heard, the exhibits that you will be
21 able to actually look at in the jury room. That's the first
22 thing.

23 The second thing you'll have to help you reach a
24 verdict that reflects truth and justice is the instructions
25 on the law, the law as to how to go about evaluating the

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1 evidence and the law about what it is to violate the
2 racketeering -- the conspiracy to commit racketeering.

3 And the final thing you had when you walked in that
4 door and you are going to take home with you when this trial
5 is over, and that's your common sense. And if you put those
6 three things together in this case, I think you can reach a
7 verdict that reflects --

8 THE COURT: Well, your own thoughts are totally
9 irrelevant, Counsel.

10 MS. JACKS: You can reach a verdict that reflects
11 truth and that reflects justice.

12 There is really one issue to decide in this case,
13 and that is whether the Government has proven beyond a
14 reasonable doubt that Steve Scott, sitting over there in the
15 defendant's chair, has conspired to violate the racketeering
16 laws of this country. That's the issue. Have they proven it
17 beyond a reasonable doubt.

18 And the Court told you, he even used these words,
19 "A trial is not a popularity contest. This isn't a chance to

20 come in here and give a thumbs up or a thumbs down on Steve

21 Scott or on the decisions he has made in his life."

22 Mr. Scott is not on trial for having tattoos.

23 Thank God for that. I guess we would have to plead guilty.

24 He's not in trial for being in prison. And he is not on

25 trial for associating or being a member of the Aryan

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1 Brotherhood. He is on trial for conspiring to violate the
2 racketeering laws of that country, and that is only it.

3 And the burden of proof Ms. Blanch referred to in
4 her argument, the burden of proof in this case is proof
5 beyond a reasonable doubt. It is the highest standard in the
6 law. If there is a traffic accident and two people are
7 fighting over who caused the accident and who is going to pay
8 for the damage, the burden of proof in that case is a
9 preponderance of the evidence. What side just slightly tips
10 the balance in his favor.

11 The standard of proof here is higher than that. In
12 courtrooms in this country, Judges make decisions about
13 whether to take children away from their natural parents.
14 The standard of proof in this case is higher than that.
15 Proof beyond a reasonable doubt.

16 Unless -- unless and until the prosecution proves
17 the truth of the charges beyond a reasonable doubt,
18 Mr. Scott, under the law, is entitled to a verdict of not
19 guilty. That's our standard of justice, and it's been

20 working all right for the last 200-or-so years. And it
21 applies -- that standard applies regardless of the person
22 sitting in the defendant's chair, regardless of whether they
23 are a Hollywood celebrity and are rich and famous or somebody
24 serving a lengthy prison sentence. Our law says that the
25 standard of proof is the same.

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1 And what the Government is supposed to do in a
2 trial like this is bring in evidence of a character that is
3 so -- well, of quality -- of quality that's so convincing
4 that it's capable of belief beyond a reasonable doubt.

5 The Court will tell you at the end of this case
6 that a reasonable doubt isn't -- it isn't an imaginary doubt.
7 A reasonable doubt is doubt based on reason, a doubt based in
8 logic, something you could point to the evidence and say
9 "Well, wait a second. I don't think that evidence" --

10 THE COURT: Well, your thoughts are totally
11 irrelevant, Counsel.

12 MS. JACKS: Your thoughts are relevant. And if you
13 look at the evidence and consider the evidence and come to
14 the conclusion that there is something that doesn't add up
15 based on logic, that is a reasonable doubt.

16 Okay. I want to just take a minute to talk about
17 something that's awkward, and I want to talk about it right
18 now. And that is if you go the back in the jury room and
19 start talking about the evidence and considering some of the

20 things you heard in this Court, things can -- it can get
21 frustrating. And I know every one of you has a life to go
22 back to. You have already given quite a bit of your own time
23 to sit here and listen to the evidence in this case. And
24 when you get back there and you get frustrated, it's easy to
25 start thinking, "Come on. What are we worrying about? I

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1 mean, here we are struggling over whether this is proof
2 beyond a reasonable doubt. And who cares? I mean, look at
3 Mr. Scott. He is tattooed. He is associating or is in the
4 Aryan Brotherhood. He is in jail. Who cares? Let's just
5 end it, vote guilty, and get out of here and go home."

6 If you find yourself thinking that way, I would
7 just ask you to make a minute, take a breath, and remember
8 your oath. Because when you walked in before you became
9 jurors in this case you took an oath to follow the law. And
10 the law is that what the Government has to prove, if they
11 can, is the truth of the charges beyond a reasonable doubt.

12 If you've seen the statue of justice or a drawing
13 of the statute justice, you might remember one thing: She is
14 blind. She is blind because the law and proof beyond a
15 reasonable doubt doesn't depend on who's sitting over there
16 in that chair. Justice looks at the facts; it looks at the
17 law; it uses logic and reaches a decision. And so if you are
18 tempted to say, "Forget it. Who cares? Who cares about
19 Mr. Scott. He is not like me. I don't like him," take a

20 breath and remember, justice is blind.

21 And, you know, ultimately I could sit up here all

22 day and tell you all these things. It's just words. Proof

23 beyond a reasonable doubt is not a mathematical formula. You

24 won't know for certain, and there is no oath police, no one

25 is going to be back there in the jury room and saying,

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1 "Excuse me. We will cite you for violating your juror oath."

2 That's not going to happen.

3 There is countries and other -- other judicial
4 systems in the world that have the same standards that we do.
5 And their citizens, I don't -- well, their citizens don't
6 feel the protection from the Government and its use of
7 Government power that we feel. And the reason is -- what
8 makes our country different is our spirit and our conviction
9 and our belief in these values.

10 And if you want to go back in that jury room and
11 say proof beyond a reasonable doubt is met by contradictory
12 statements of witnesses that have been bought and paid for,
13 you can. Nobody is going to stop you. You, the 12 of you
14 who decide this case, are going to decide whether we follow
15 the law in this community and what justice is going to be in
16 this community.

17 Now, I said -- I said at the beginning -- I think I
18 said it -- that this case is about credibility. Credibility
19 has two things associated with it, honesty and reliability.

20 You could be as honest as you wanted. A witness could be as
21 honest as you could ever expect. But if they didn't see it,
22 it they didn't perceive it, they have got nothing to base
23 their testimony on it. And a witness that was there or that
24 maybe saw things, if they don't have a commitment to be
25 honest, to take an oath to tell the truth and tell it, then

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1 they are not credible.

2 When you consider the testimony in this case,
3 consider both of those aspects of credibility. Honesty, has
4 the witness expressed a commitment, conveyed a commitment,
5 exhibited a commitment to tell the truth. And reliability,
6 was the witness testifying to something that they heard, that
7 they saw, or something that got passed down through many
8 other people?

9 You know, the Government acts like they don't have
10 to prove anything. I think -- well, when you get back in the
11 jury room and after you hear the Judge's instructions you'll
12 see they have quite a bit to prove. And if all they have to
13 prove is that Mr. Scott's in the Aryan Brotherhood, then I
14 think this case would have ended in about an hour. Put in
15 some letters and photos, got some Aryan Brotherhood stuff in
16 this photo album, and I rest my case. But what have we been
17 doing here? What have we been doing here this past week?

18 The Government is trying to show you, what they
19 claim, is that Mr. Scott's actions show that he conspired to

20 violate the racketeering laws. That is their argument. And
21 that's why they spent time trying to show you that Mr. Scott
22 stabbed Benitez-Mendez or showed you why Mr. Scott stabbed
23 Mr. Bond.
24 I want to take some time to look at some of those
25 acts and the evidence that you heard and discuss that with

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1 you. And I'm going to start with the -- with the
2 January 4th, 1992, stabbing of Ismael Benitez-Mendez at
3 Leavenworth. No question that Mr. Benitez-Mendez was
4 stabbed. No question that it happened in B Upper at
5 Leavenworth. And the Government brought you a parade of
6 paid-for witnesses to tell you various things about that.

7 I don't know if you remember this, but way back --
8 I barely remember it, but way back, one of the first days of
9 testimony, the Government read the stipulation of William
10 Halpin's testimony. William Halpin was a correctional
11 officer at Leavenworth on January 4th, 1992. He was an
12 eyewitness to the stabbing. And William Halpin -- I'm going
13 to use some of the photographs that we -- that we introduced
14 yesterday about the crime seen when I talk about this.

15 But William Halpin was asked this question and he
16 gave this answer.

17 "Officer Halpin, where were you standing when
18 you saw these two inmates, one chasing the other
19 with a knife?

20 "ANSWER: On the Flat 3 by the mailbox."

21 You'll -- you'll have these exhibits in the jury

22 room. This is Exhibit 256. This is the mailbox on B Upper

23 at Leavenworth. And the reason you got this picture is to

24 help you see the mailbox in other pictures, because the way

25 that the place is painted, it's not always easy to find.

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1 This is the mailbox. Here's the mailbox in context. And I
2 guarantee you that it's more clear on the eight-by-ten photos
3 that it shows up on the screen, but it's right here
4 (indicating). That is where Officer Halpin is standing.

5 "QUESTION: When you saw from the flat on the
6 third level the two inmates running, where did you
7 see them?

8 "ANSWER: Coming off 5, down to 4, on the
9 steps."

10 Here's Exhibit 350. You didn't get to see this
11 yesterday, but this is what is called 5-I. The other
12 level -- if you remember the diagram of Leavenworth -- let
13 me -- let me fish that out.

14 Do you remember the schematic diagram of
15 Leavenworth and the -- and the three levels? And this is the
16 one without the -- this is the diagram -- this is 350-A, and
17 it's the diagram without the stairway.

18 And this photograph, the photograph I'm about to
19 put right back on, is standing on this fifth here, this 5-I,

20 looking towards the front of the unit. The mailbox is down
21 here looking towards the front of the unit. Standing on
22 that fifth level, looking toward the front. And what
23 Officer Halpin says is when he saw him, when he saw
24 Mr. Benitez-Mendez and the person that stabbed him, they were
25 coming off the 5, down to 4, on the steps.

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1 And you see right here, this is beginning of the
2 stairway here on 5.

3 Exhibit 353, if you look at 353-A, you will see
4 where this is taken from. But this is standing at top the
5 stairs at 5. You go down these stairs. You are in Yard
6 Level 4. And if you look here, this is the -- whoops, excuse
7 me.

8 This is the tier on Level 4. You will have a
9 photograph of that, too.

10 So off of 5, down to 4, on the steps. Right here,
11 this is the end of the stairway that goes down to the flat of
12 3. And if you look right up here at the top, you can see the
13 phones -- the phone booths that are next to the mailbox.

14 Okay. Here is Exhibit 355. This is a stairway.
15 It's just from the bottom. This is standing at the bottom of
16 the stairs on 3 looking up. Whoops. Looking up, fourth
17 level; further up, fifth level. Let me see if this is -- the
18 stabbing happened, according to Halpin, coming off of 5 down
19 to 4 on the steps. Off of 5, down to 4 on the steps. Right

20 here.

21 And Exhibit 359 is Officer Halpin's view. This is

22 a -- this is a photograph taken from the mailbox looking

23 towards the stairway where Officer Halpin saw the stabbing.

24 "QUESTION: --"

25 They asked questions about what the inmates are

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1 wearing and what the assailant was wearing. And then he is
2 asked this question.

3 "QUESTION: Were you able to see anything of
4 the size or hair coloring or eye coloring or skin
5 coloring of the man who had the knife?

6 "ANSWER: No. Not that I can recall, other
7 than he was an African-American."

8 This is the view the eyewitness had, Correctional
9 Officer Halpin, standing at the mailbox, watching
10 Mr. Benitez-Mendez get stabbed, off of 5, down to 4, on the
11 steps. The stabber was an African-American.

12 And what -- what else do you know? Remember the
13 testimony of Officer Del Muro, the -- the hunter, the
14 correctional officer who testified that he saw the blood
15 splatter? And that he has some experience about determining
16 how -- where something occurred -- well, the movement based
17 on the blood splatter.

18 And do you remember what Officer Del Muro told you?
19 That the blood splatter was coming down off of 5, down to 4.

20 And then whoever was cut ran back up. It corroborates

21 Officer Halpin's testimony.

22 And yet the Government parades in, if I count it

23 right, one, two, three, four, five -- five witnesses, bought

24 and paid for, took an oath to tell you the truth, got up on

25 that stand, and said, "I heard it was Steve Scott."

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1 "T.D. Bingham told me it was Steve Scott."

2 "Steve Scott told me it was Steve Scott."

3 Let's just take a look at some of that testimony,
4 and let's take a look at how credible that is. I'm going to
5 take them in order that the Government brought them to you.

6 The first was Glenn West. He is out of custody
7 right now. This is a man that's been -- received over
8 \$80,000 in benefits from the Federal Government. Somehow,
9 even though was doing a 65-year sentence, had some escapes, I
10 think hostage taking, he managed to get out of prison.

11 And he was brought to you -- if you remember,
12 Mr. West was charged in this case. And Mr. West was
13 arrested, put on bail out, and was taken down to Terminal
14 Island where he sat in his cell 22, 23 hours a day, reading
15 the indictment in the case with access to the reports in the
16 case.

17 And I think it was Agent Halualani who told you,
18 those documents included reports, Lieutenant Benson's report
19 regarding the stabbing of Ismael Benitez-Mendez. And

20 after -- what, 12 years after the Benitez-Mendez stabbing,
21 Mr. West says, "Oh, yeah, yeah. Steve Scott did it. Donny
22 Kennedy told me. Donny Kennedy told me he gave Steve Scott
23 the knife."
24 Well, first of all, I'll just take a second to talk
25 about that. Remember, I think I asked Agent Halualani about

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1 that. Because remember, Donny Kennedy says, "That didn't
2 happen. I didn't give the knife to Mr. Scott to stab
3 Benitez-Mendez, and I never told Mr. West that I did."

4 And we asked Agent Halualani, "Well, you had these
5 two conflicting stories. I mean, West is one of your
6 Government witnesses. Donny Kennedy is one of your
7 Government witnesses. They are saying different things.
8 Well, what did you do?" He said, well, he looked at -- he
9 thinks he looked at the housing records to corroborate it.
10 Well, you are going to get to look at the housing records,
11 and you're going to see, they don't corroborate it. In fact,
12 they show there's no way that Mr. West -- that Donny Kennedy
13 said anything to Mr. West about that at Leavenworth.

14 Let's see if I can do this. These housing records
15 are a little challenging at first, but they are not hard to
16 read. They are not hard to understand. We're going to let
17 you look at them.

18 Essentially what they do is they show the
19 institution with an abbreviation, where an inmate was housed

20 and when. Some of the records show cell assignments. And
21 I'm looking at Exhibit 161, which are the housing records for
22 Donny Kennedy. And we know that Benitez-Mendez was stabbed
23 in January of 1992.
24 And it helps, I think, when look at these records
25 to have a piece of paper to help you follow across the line.

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1 But let's look -- here we go. Is that on the screen over
2 there? Donald Kennedy. Let's go -- let's look at both of
3 these.

4 All right. This shows -- the one I'm add -- the
5 one I'm onto right here is from 08/23/91, 1911, 7:11,
6 military time. But 01/07/92, at 1533 hours, 3:30, he's in
7 Unit B Upper at Leavenworth, L.D.X. And then he gets moved
8 to administrative detention, and he is there at Leavenworth
9 until 04/29/92, 11:14 in the morning. After that, he is
10 moved to another institution. You can see that right here.
11 He goes to E.R.E., looks like Oklahoma, and then Lompoc. So
12 he has moved. 04/29/92.

13 Now, remember Mr. Halualani said that West told him
14 that Kennedy told him that he gave the knife to Steve Scott
15 to stab Benitez-Mendez. And he told him that at Leavenworth.

16 So here we have Exhibit 169, the housing records
17 for Glenn West. And these -- I'm not sure what your copy is
18 going to be like, but the copy I pulled out appears to have
19 been Xeroxed incorrectly. I'm not sure that's not the case.

20 But let's look at when Steve Scott left
21 Leavenworth. Well, first of all, where was he in January of
22 1992? Looks to me like he was in Marion in December -- in
23 Cell B -- B-C-7 from December of '91 to April of '92. And if
24 you look up here, he does go to Leavenworth eventually. He
25 gets there in the June, June 24th of 1992, two months after

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1 Donny Kennedy left. So the records don't corroborate that
2 there was that conversation at Leavenworth. In fact, it
3 shows that it's impossible. It didn't happen.

4 You have got to wonder what's the Government's
5 commitment to the truth when that's the kind of evidence they
6 are presenting and trying to tell you is believable.

7 MS. BLANCH: Objection.

8 MS. JACKS: Donald Kennedy, Witness Number 2 to try
9 to pin Steve Scott with the Benitez-Mendez -- well, the
10 Benitez-Mendez attempted murder. Donald Kennedy was also
11 charged in this case, and he -- he was in the unique position
12 of witnesses in this case because he was actually interviewed
13 before he had access to the discovery, unlike Mr. West.

14 And Donald Kennedy in November of 2002, was asked
15 questions about the case, shown the indictment, didn't say a
16 word about Benitez-Mendez or Mr. Scott or anything of that
17 nature. But after sitting in his cell for about a year or
18 so, reading the discovery, making a deal on the case to
19 become a Government witness, suddenly it's, "Oh, yeah, yeah."

20 I don't know if any of you ever watched Saturday
21 Night Live, Joe Piscopo, the guy from Jersey, "That's the
22 ticket. It was Mr. Scott."
23 And he tells -- he tells us, in an effort to get
24 out of his legal troubles, make a deal with the Government,
25 "I was there, and Mr. Scott showed me where it happened."

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1 "Well, Mr. Kennedy, would you show us where you

2 claim Mr. Scott showed you?"

3 And where did he point? Do you remember? Over

4 here on the even side of the tier. I mean, if Mr. Scott

5 showed him where it happened, you would think he would get it

6 right.

7 It's a lie. And can you blame these people? I

8 mean, these people have the rest of their lives to look

9 forward to sitting in a cell 22 or 23 hours a day. Most of

10 them have tried to escape. That hasn't been a particularly

11 worthwhile endeavor. And so they come up with other ways to

12 get out. It worked for Mr. West. Why wouldn't it work for

13 Mr. Kennedy.

14 And the way they escape is not using force, like

15 many of them have tried in the past. It's not taking

16 hostages, like they have tried in the past. It's using their

17 mouth. And, you know, I mean, what's the downside? Come on?

18 I mean, "Oh, if we get caught lying we won't be a Government

19 witness." Well, yeah. So you will just be back in your cell

20 where you started; right? Sitting in jail for the next

21 59 years or whatever it is. That's Mr. Kennedy.

22 They we have Weasel, William Kelly. William Kelly,

23 who when initially interviewed within a year or so after

24 Benitez-Mendez was stabbed, asked specifically, "Steven

25 Scott, do you know him?" No idea. You heard him saying

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1 himself, he interviewed for something like four days in
2 November of 1993, numerous law enforcement agencies. They
3 gave him a copy of report they wrote so he could go through
4 it make sure it was right. Didn't know Mr. Scott. But
5 suddenly, when it helps to know Mr. Scott and to implicate
6 Mr. Scott, he's happy to come in here and tell you, "Well, I
7 know him. Not only do I know him, he confided in you what he
8 did to this guy."

9 Waylon Gene Bentley. Didn't take him long to jump
10 on the witness train. This is the guy who at least said at
11 one point that, well, "I was --" This is the guy that gets
12 to Leavenworth and starts up his own book. He is not exactly
13 needing any sort of gang affiliation because he is a con man,
14 and he knows how to run a hustle. He has been running a
15 hustle his whole life. He runs them from prison and
16 apparently still running them.

17 THE COURT: Counsel, there is no evidence of that.

18 Please do not state that.

19 MS. JACKS: Mr. Bentley told you at the --

20 testified that -- he said, "Originally that when you an
21 associate --" He was an associate of the Aryan Brotherhood,
22 is what he said. And associates don't learn the Aryan
23 Brotherhood business. They wouldn't -- they wouldn't fill
24 you in on their inner workings.
25 But suddenly, when it helps to have known what was

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1 going on at Leavenworth, he was an associate. He was
2 associate in the note, and Mr. Scott confessed to him and, in
3 fact, he had talked to Mr. Scott.

4 If you look at his housing records -- and I forgot
5 what exhibit that is -- you will see he was at Leavenworth a
6 total of maybe, what, four or five months before the
7 Benitez-Mendez stabbing. But he would like to convince you
8 that -- the he was hearing all the inner workings of the
9 Aryan Brotherhood and that Mr. Scott's copping now to him to
10 an offense that he never did.

11 Now, Kevin Roach. That was kind of an interesting
12 one because -- well, wait. Let me go back a second to
13 Mr. Bentley because I forgot this part of it. Mr. Bentley's
14 original story was that he didn't hear it from Mr. Scott. It
15 was that he heard it from T.D. Bingham, who told him that he
16 ordered Mr. Scott to stab Benitez-Mendez.

17 By the time he got around to testifying earlier
18 this year, it was, "Oh, yeah. Mr. Scott told me to."

19 You know, the Court is going to read an instruction

20 about statements like that, people testifying that so and so
21 told me this or so and so told me that. And there is really
22 two levels to analyzing that. That is the easiest thing in
23 the world to make up.

24 I mean, I don't know if any of you have ever
25 experienced it, but when somebody claims that I told them

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1 something that I didn't tell them, it makes me mad. And it's
2 the hardest thing in the world to disprove because all it is
3 somebody saying you said something.

4 And there are two levels of inquiry with that --
5 with a statement like that. You have got to try to figure
6 out, did the person ever really say it, and if they did say
7 it, what did they say?

8 And I think that instruction is particularly
9 appropriate to analyzing some of the things that Mr. Bentley
10 said from the stand.

11 But let's move on to Kevin Roach because Kevin
12 Roach tells you, "Two people told me that Mr. Scott stabbed
13 Benitez-Mendez. They said it happened in A unit, and they
14 said that Mr. Benitez-Mendez was a Latin King. Those two
15 people were Mr. Bingham and Mr. Scott."

16 And miraculously, "Although I talked to them at
17 different times, they both chose to lie about it in the same
18 way," by obscuring where it really happened or the gang
19 affiliation of the person who was stabbed.

20 He got it wrong. Mr. Roach got it wrong because it
21 never happened. Remember, Mr. Roach wasn't even at
22 Leavenworth when this whole thing happened. How did he even
23 hear about Benitez-Mendez or anything that was going on at
24 Leavenworth in '92? Any idea? Wasn't Mr. Roach housed with
25 Mr. Bentley and Mr. Bernard after all three of them had made

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1 deals to become witnesses for the Government? Sitting around
2 the table all day, nothing really to do except work on the
3 case that they are getting paid to work on; that they are
4 expecting to be their ticket to freedom out of the A.D.X.
5 Well, all of these guys sitting around talking, how
6 surprising that Mr. Roach has inside information on what
7 supposedly happened at Leavenworth when he wasn't even there.

8 As the icing on the cake, on the icing of that
9 Government witness paid-for case, the Government has offered
10 you something else. There is more. What did they offer you?
11 The testimony of Lieutenant Benson.

12 Here is a photograph of Steve Scott. I think
13 Ms. Adams told you that this was taken -- this is at A.D.X.
14 And again, photographs, the eight by tens are much clearer,
15 but what you are going to see when you look at the eight by
16 ten -- and you'll have it back in the jury room. This is
17 Exhibit 306.

18 It is right here. It's that 666 tattoo you have
19 heard so much about. It's right here. It's real charming.

20 But significant to the tattoo, and the reason we put these
21 photographs in, is because the Government is trying to say as
22 their icing on the tape of these informants laws is we know
23 it was Mr. Scott because right after Benitez-Mendez was
24 stabbed, he had a fresh Aryan Brotherhood tattoo of 666.
25 Right? Isn't that what Benson tried to say? Conveniently.

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1 And he showed you some photographs during the
2 testimony of Mr. Benson that Mr. Benson -- where were they
3 taken? When were they taken? We don't really have any idea
4 of exactly when those photographs were taken. He claims it
5 shows a fresh tattoo. You can look at it back there in the
6 jury room, and you'll see very clearly, it doesn't show a
7 fresh tattoo.

8 And then Mr. Benson seems to have forgotten about
9 this photograph. This is Exhibit 303. And this one is not
10 that good of quality. It's a copy of Polaroid. But
11 obviously it's even more blurry when you look at it on the
12 Elmo.

13 This is a photograph -- Mr. Benson tried to act
14 like he didn't know about this photograph. Remember, he was
15 taking Polaroids the day that Benitez-Mendez was stabbed and
16 dating them and signing them. I think several of them were
17 introduced. When he looked at this one, he sort of tried to
18 shy away from it and acted like, "Wait a second. I don't
19 remember this photograph," although it is dated and signed

20 the same day as the other Polaroids.

21 And if you look -- and again, this original is

22 better than what you seeing up there, there is a 666 tattoo.

23 Now, I don't know what -- exactly what Mr. Benson's theory

24 is. I mean, did Mr. -- did Mr. Scott stab Benitez-Mendez and

25 then run to his cell and for the next ten hours quickly get

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1 tattooed, pop out just before midnight, and get this
2 photograph taken or what? I mean, what is the explanation?

3 He is trying to sell you a bill of goods about
4 Mr. Scott, and he thinks he can do it because Mr. Scott is an
5 inmate that he says is in the Aryan Brotherhood.

6 And what's really interesting, I mean, the
7 Government has got a video of a correctional officer
8 unwrapping a knife that Mr. Scott had in his rectum. He's
9 got that in all of its gory detail. And yet a photograph of
10 this supposedly fresh, oozing, bleeding "666," I just joined
11 Aryan Brotherhood tattoo, where is that?

12 How about just a photograph of what Mr. Scott
13 looked like before Mr. Benitez-Mendez was stabbed? Oh, no.
14 That don't exist. Can't really explain why. We just can't
15 find them. They can't find them because they don't exist.
16 Mr. Scott had that tattoo, as unattractive as it is, since
17 1985.

18 Paul Brown, the tattoo artist, told you about it.
19 He told you about how long it took, how he did it, that he

20 did it to match the other tattoo Mr. Scott had. And if you
21 look at the photograph of Mr. Scott at A.D.X. -- I'm going to
22 show you that in a second. But if you look at it, you can
23 see the location -- you can see where the tattoo is located.
24 Now, Mr. Scott has been in prison a long time. I
25 think you heard the stipulation that it was sometime in 1989.

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1 This picture -- I think it's part of -- part of Exhibit 383.

2 There are three photos. This is the first photo, a snapshot

3 on the beach. Well, we know for sure that that had to be

4 taken before 1989 or before Mr. Scott ended up in jail in

5 1989 because he is not going to beach with women in swimming

6 suits after 1989.

7 And he has his shirt off.

8 And what you are going to see there are two

9 enlargements. There is two enlargements of this photograph.

10 And it's grainy, and it's not the best quantity, but it's the

11 best we can do to show you that Mr. Scott, at this time, on

12 the beach sometime before 1989 had a tattoo in the same place

13 that the Paul Brown give him the 666. And this is the first

14 enlargement. I'm sure it's going to be fuzzy on there. It

15 is fuzzy. I'm going to put it up. And if you look at --

16 Let me go back.

17 Let me go to 306. If you look at this carefully,

18 Mr. Scott has a tattoo of what appears to be a woman, and

19 these are her breasts on his chest. And this 666 is just

20 under what would be the woman's right breast. Right here.

21 The blowup of the photograph on the beach, you can kind of

22 make out the woman, and here's her left breast, and here is

23 what appears to be a tattoo in the exact position as the 666.

24 It's not perfect. And I wish we had a better photograph, but

25 we don't. This is the best we can do. And it certainly

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1 shows you, if you look at it carefully, that Mr. Scott had a
2 tattoo where Paul Brown says he gave him the 666 tattoo
3 before he ever ended up in federal prison.

4 Startling? I mean, the Government's lined up,
5 what, six or -- six people to come in and tell you a story
6 that you know is false. I mean, it's -- it's a little
7 shocking that people would be so willing to do something to
8 help themselves at the expense of another person.

9 MS. BLANCH: Objection.

10 MS. JACKS: Maybe that gives you some idea of how
11 desperate people get when they are serving long prison terms.
12 And you've got to wonder when the agent in charge of the
13 investigation tells you he corroborated something that he
14 clearly didn't corroborate. How clear -- how clearly the
15 Government is really looking at this sort of thing, looking
16 at this evidence. Or are they just sort of accepting
17 whatever fits their version of the truth and turning a blind
18 eye to stuff that doesn't.

19 I try to remind myself this is the same Government

20 that told us there were weapons of mass destruction in Iraq.

21 MS. BLANCH: Objection.

22 THE COURT: The objection is sustained.

23 And you know that is improper, Counsel.

24 MS. JACKS: It is --

25 THE COURT: Please do not do that.

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1 MS. JACKS: The Leavenworth stabbing of
2 Benitez-Mendez provides you with an example of what's going
3 on here. And what's going on is there is not a concern or
4 commitment to finding the truth. There is a commitment to
5 convicting Mr. Scott.

6 I want to talk to you about Springfield, and I'm
7 rapidly running out time. Springfield, why is that
8 important? And you have got in your -- you have got in your
9 exhibits, Mr. Scott's been convicted of that. Mr. Scott's
10 been given time for stabbing Mr. Bond.

11 The point that the Government wants to make about
12 the Bond stabbing is they want to tell you that was done in
13 furtherance of a war against black inmates. That's why we
14 have heard testimony about it today or in this trial.

15 And they want you to rely on Scott Cupples. They
16 want you to take Scott Cupples word that this was a plan;
17 that it was a plan that was hatched because John Gotti --
18 always good to work Gotti into it. That John Gotti came onto
19 the unit and communicated while at the rec yard with Patrick

20 Mills, using sign language about you've got to hit this guy
21 Bond because of -- because he is from Marion or he is from
22 D.C., and we don't like him. And as Bond left the unit, he
23 kind of give a little thumbs up or a signal to Mr. Cupples
24 that, yeah, that is the guy, the guy in Cell Number 1. And
25 that as a result of that conversation, Mr. Scott stabbed

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1 Mr. Bond. That is the story.

2 First of all, you will have in the jury room some
3 pictures from Springfield and the diagram, and you will be
4 able to get sort of an idea about -- about where things were
5 situated.

6 But this is the rec unit, and this is exhibit -- or
7 the outside rec, 374. It reminds me of dog kennels, you
8 know.

9 THE COURT: No. Your personal opinion is totally
10 irrelevant, Counsel.

11 MS. JACKS: They are cages in Cyclone fencing. And
12 according to Mr. Cupples, Mr. Gotti was in one of these cages
13 when he communicated with Patrick Mills through one of these
14 windows using sign language. That's the story he tells you,
15 and that provides his motive for attacking Mr. Bond,
16 according to the Government.

17 There is one problem with that -- and there is
18 probably more than one problem, but there is one problem, one
19 big problem. This is Exhibit 374-A. And I'm not going to be

20 able to fit the whole thing on the Elmo. This is a -- it's
21 the same diagram as Exhibit 18. It just encompasses more of
22 the institution. And if you compare it to Exhibit 18, you
23 will see here the entrance to the unit. Here is -- here is
24 the center hallway. Here is the big shower where
25 Mr. Calderon told you he was, and you keep going through this

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1 hallway, down the stairs, here is the outside rec yard.

2 Now, what do you know? What do you know about this

3 story? Certainly we heard some testimony that Mr. Gotti

4 occasional uses outside rec area. That's possible.

5 But what do you know about Patrick Mills, the

6 person who was supposedly signing with Mr. Gotti, according

7 to Mr. Calderon's story? Patrick Mills wasn't housed in

8 these cells.

9 MS. BLANCH: Objection.

10 MS. JACKS: According to the testimony of

11 Officer Conard and the testimony of Mr. Calderon, another

12 inmate, Mr. Mills was housed down here on the same wing as

13 the big shower, just further down. He didn't sign anybody in

14 the rec yard. And we know, if you look at Mr. Cupples'

15 housing records -- which I thought I pulled out. I did --

16 you can almost -- this is Exhibit 158. And let me get this

17 piece of paper.

18 We've got Mr. Cupples -- that the stabbing --

19 Mr. Scott stabbed Mr. Bond the day after Thanksgiving in

20 2000. November 24th. We've got Mr. Cupples on the unit for
21 an hour and four minutes on October 24th.
22 You see that? He comes in at 11:30 and leaves at
23 12:34. And then he goes to a different ward at Springfield,
24 Ward 1-4, and he is there until November 7th. And he is on
25 Unit 21 E from November 7th at 1:30, 1:44 in the afternoon to

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1 December 6th. And remember, the stabbing happens
2 November 24th. So Mr. Cupples was there for, what, two or
3 three weeks prior to the stabbing. That's it. I'm talking
4 about a very short period of time.

5 And Mr. Cupples -- well, let me go back.

6 What else do you know about Mr. Cupples? He told
7 you. He -- at the time he became a witness for the
8 Government, he wrote a letter to the S.I.A., the person in
9 charge of intelligence at A.D.X. And this was after the
10 indictment came out, and I think it was March of -- I'm
11 sorry. February of 2004.

12 And Mr. Cupples told you that in that letter, he
13 was -- he wanted to get rid of his Iowa sentence. He had
14 been -- remember, he claimed he had 65 years to do in Iowa
15 and he did six years. He was brought to the federal. And he
16 found out that Iowa wanted him to come back and do 59 years,
17 and he was angry about it. And he wrote that he could
18 provide, quote, incentive if the Government could do
19 something about those 59 years.

20 And his first story -- his first story that he
21 writes out to the officer, remember what -- well, first of
22 all, did he mention John Gotti? No. Did he mention this
23 Patrick Mills signing with John Gotti and all this intrigue
24 about why Mr. Bond was stabbed? No. And do you think if
25 Mr. Cupples -- well, clearly he realized that information was

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1 for sale; that if he provided good enough stuff, maybe he
2 could get rid of those 59 years. And he didn't mention
3 John Gotti or this signing or this mysterious way of passing
4 a message? Come on. If it was true, he would have told in
5 that -- he would have told Mr. Smith in that written -- in
6 that -- in answering those questions and in that writing.

7 But instead of what Mr. Cupples says was that,
8 yeah, Steve Scott stabbed Bond, says that he heard Mr. Bond
9 sharpening a knife in a cell the night before.

10 And Mr. Cupples, along with the correctional
11 officers and Mr. Calderon, told you what was going on there
12 on Unit 21 E when people were being moved. It wasn't by the
13 book, lock up the inmate in this cuffs and escort them down
14 the empty hallway to the shower so there wasn't a chance that
15 somebody could attack somebody else. They were running
16 people down to those showers to try them get it down. And
17 they were running people; they were opening people's doors
18 without handcuffing them. They were moving multiple
19 high-security inmates down the hall at the same time.

20 How do you think that affected Mr. Scott? A man
21 who had lost 20-something pounds; a man who couldn't think
22 straight because his blood didn't have enough oxygen in it; a
23 man who heard the guy next to him in the cell sharpening a
24 knife all night.
25 Whether you think it was right or wrong that

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1 Mr. Scott stabbed Mr. Bond, it is really -- clearly, it was
2 the wrong decision, and Mr. Scott's been convicted and
3 sentenced for that.

4 The question for you is did Mr. Scott stab Mr. Bond
5 because he thought Mr. Bond was going to stab him? Or did he
6 stab Mr. Bond because of a 1988 conspiracy to kill black
7 inmates?

8 I want to show you one other thing about that
9 because, remember -- remember that list, the party list?
10 Mr. Bond's name isn't on it, and you check me on that. Go
11 look and see. But there was one inmate who was on it that
12 Danine Adams identified, a guy named Gerald Kelly. So, I
13 mean, he was on that list from the beginning. And I want to
14 you show something interesting about Mr. Kelly. We have his
15 housing records, and those have been introduced for you to
16 take a look at.

17 You know what? I pulled out -- I pulled out the
18 page. Here they are.

19 This is a guy on the list. D.C. Black inmates,

20 inmates that the Government says Mr. Scott was ordering hits
21 on. Look where he is. Oh, my gosh. You heard Mr. Scott got
22 to Springfield, I think according to Dr. Khalil, June of
23 2000. Let's see. Well, goodness, Mr. Kelly is on Unit 21 E
24 in June of 2000, in July of 2000. Looks like he gets moved
25 around sometimes. He back there in September of 2000. He is

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1 back there again in September -- September to October.

2 What evidence is there of Mr. Scott trying to put
3 the hit on Mr. Kelly? Somebody on the list. And this is
4 before -- you notice that if Mr. Scott was -- was at war with
5 the D.C. Blacks and out to kill them, he had access -- was on
6 the same unit as Mr. Kelly prior to starting the Interferon
7 treatment, prior to losing 20-something pounds, prior to
8 feeling -- how can I say -- well, how did he describe it?
9 Like he was losing his mind, prior to being weakened by the
10 treatment he was given for Hepatitis C. No evidence that he
11 ever tried to do anything to hurt Mr. Kelly.

12 I'm -- I'm rapidly running out of time; so I'm
13 going to kick it up a little bit here.

14 Inman, that was an interesting one. We --
15 Mr. Scott --

16 THE COURT: Your personal opinion is totally
17 irrelevant, Counsel. Please.

18 MS. JACKS: According to the testimony of
19 Mr. Roach, he first implicated Mr. Scott and Inman in the

20 Inman stabbing something like, what, 13, 14 years after that
21 happened. If you recall, Mr. Inman was the man that was
22 stabbed on the yard at Marion, and suddenly in 2006,
23 Mr. Roach jumps on the bandwagon and says, "Oh, yeah.
24 Mr. Scott -- yeah, yeah. He was the one that hid the knife."
25 First of all, we know Mr. Roach made stuff up about

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1 Mr. Scott regarding Benitez-Mendez.

2 MS. BLANCH: Objection.

3 THE COURT: The objection is sustained.

4 MS. JACKS: The evidence shows.

5 THE COURT: It will go out.

6 MS. JACKS: The evidence shows that Mr. Roach made

7 stuff up about Mr. Scott regarding Mr. Benitez-Mendez. And

8 the evidence will show you that Mr. Roach made stuff up about

9 the Inman stabbing. You haven't seen these documents yet,

10 but remember, Mr. Roach said the word and the message to stab

11 Inman came from David Sahakian, came from Pelican Bay.

12 And we just got these documents in. You've got to

13 wonder -- we -- we just got the documents in. They are

14 marked as an Exhibit 316, and it's David Sahakian's history

15 at California Department of Corrections and where he was

16 housed. And it takes some navigating to get through it, but

17 what you will see, if you compare where he was to the

18 institution, the key that shows what the abbreviation for the

19 institution was, it will show you that David Sahakian, he was

20 in a California state prison all right, but never at

21 Pelican Bay.

22 I want to take a minute to talk to you about the --

23 the letters and the writings that -- that -- I think it's

24 People's 2 through 6, something like that, the writings of

25 Mr. Scott. Hopefully the questions and the testimony help

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1 you put those letters in the context and -- of when they were

2 written and what was going on at the A.D.X.

3 And if you recall, probably the testimony of Danine

4 Adams was the most comprehensive as to what was going on at

5 A.D.X. at that time, and what sort of altercations had been

6 happening between the black inmates and the white inmates.

7 And there is one thing I want to draw your

8 attention to in particular, which was there was -- that

9 Ms. Adams told you that she concluded that that list, that

10 party list was a hit list. And she conceded that she didn't

11 take into account when she made that conclusion how Mr. Scott

12 used the word "party" in other communications.

13 And you are going to have the letter that -- that

14 Mr. Scott wrote that Danine Adams testified about, and that's

15 also an exhibit. I don't remember the number, but it's in

16 the late 300s. And that is the letter to Irese Simpson. And

17 if you read the letter -- and you will have the original of

18 that letter. You will see that Mr. Scott refers to -- it's

19 something along the lines of "Is it true that Gene won't let

20 little Stevie come to the party?" And in the context of the
21 letter what is clear is that Mr. Scott is using the word
22 "party" and "coming to the party" as meaning into or
23 associating with the gang.

24 And I would submit to you that when you look at the
25 evidence and the testimony about the party list and the way

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1 Mr. Scott has used word "party," that party list is not a
2 list of people to be murdered. It's a list of people
3 associated with and involved with the D.C. Black gang, the
4 gang that was threatening to kill white inmates on site, they
5 ended up at the rec yard. The gang that Butch Johnson was in
6 when he hit the old man, Joe Tocash with a radio and started
7 the events that you heard about in the past week.

8 One just final sort of aside on that list, the --
9 the Government has brought up the fact that Wardell Hillard
10 is on that list, and Wardell Hillard was stabbed by Jesse Van
11 Meter. And if you think back on the testimony, and I know
12 there's been a lot of detailed factual testimony. But if you
13 think back on that and look at the testimony of Scott Cupples
14 and the testimony of Danine Adams, Mr. Hillard was stabbed by
15 Jesse Van Meter in November of '97. Jesse Van Meter was the
16 guy -- a white guy from a gang called The Dirty White Boys.
17 Jesse Van Meter got his jaw broken and stabbed at Marion in
18 January of '97, and he got transferred to A.D.X. for being in
19 that fight. And when he ended up there and was put on that

20 yard, he attacked the first black inmate he came upon.

21 And Mr. Cupples told you at that time Jesse Van

22 Meter wasn't in the Aryan Brotherhood. Jesse Van Meter was a

23 white inmate that had been attacked at Marion, and he was in

24 The Dirty White Boys.

25 The knife. No question that Mr. Scott had a weapon

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1 keestered on January 30th, 1998. Is that evidence of a
2 conspiracy to murder black inmates? I guess that is a
3 question for you to decide. When you think about that, I
4 would ask you to think about a couple of things.

5 Is that knife or was the weapon or the piece of
6 metal that was bent in condition at that point to be used as
7 a weapon? Was it readily accessible? And what do you know
8 about inmates and weapons in prison? Does the fact that an
9 inmate possessed a knife in prison in 1998 at A.D.X. make
10 them a conspiracy -- involved in a conspiracy to murder
11 blacks? And if it does, I would submit that there ought be
12 about 500 people sitting here at this table instead of
13 Mr. Scott.

14 Is the evidence that Mr. Scott possessed a weapon
15 anything more than evidence that he was attempting to exist
16 and survive in a violent and brutal environment?

17 There are a couple of exhibits in the exhibit book
18 that you haven't heard testimony about. Some -- there are --
19 there is one exhibit which is pages from Mr. Scott's photo

20 album or scrap book, whatever you want to call it, the pages
21 that were returned. And essentially it's been -- it's been
22 offered into evidence to give you a complete picture of what
23 that photo album and what that scrap book looked like.
24 Consider it for what you want.
25 And -- and the other thing is -- you know, I'm not

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1 sure -- I don't remember off the top of my head if this is in
2 evidence or not, but you heard some testimony about it. And
3 it's just another example, I think, of some of the
4 overreaching that you have witnessed here during the course
5 of this trial. And that is the reading list. I think -- I
6 want to say, off the top of my head, it was Exhibit 63. And
7 it was the reading list that was found in Mr. Scott's cell
8 that turned out to be -- I think Mr. Roach told you about
9 this. It turned out to be a list of books and reading that
10 were part of the course that was being played on the -- on
11 the closed-circuit prison TV channel, part of The Stepdown
12 Program, where they were watching college lectures on various
13 philosophers and -- and reading those books, listening to the
14 lectures, and provided with the discussion questions about
15 those. That was a study guide.

16 And if you recall, one way to get out of A.D.X. is
17 to progress through The Stepdown Program and to educate
18 yourself. And -- and the fact that that's found in
19 Mr. Scott's property isn't some incriminating evidence of

20 conspiratorial Aryan Brotherhood gang activity. It's an
21 effort to work his way out of prison based on what the prison
22 says is the way to work yourself out.

23 There is a reading list that has been testified
24 about, as the -- you know, sort of the Aryan Brotherhood
25 university, the reading materials for the future criminal

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1 that the Aryan Brotherhood sponsoring. Just a couple of
2 comments about that.

3 Number one, Mr. West told you he saw that list back
4 in 1993, and I think the evidence is that thing wasn't even
5 put together until November or December of 1997. But that's
6 some of the evidence that the Government has offered you.

7 And I think if you compare -- well, look at that
8 list and some of the reading materials on the list that came
9 from Mr. Scott's cell, you will see that there are
10 similarities in some of the books and some of the selections.

11 That's the evidence. I don't get to argue again.

12 The rules are whoever has the burden of proof gets to go
13 twice. So after Ms. Blanch argues, when I don't get up and
14 start to move toward the podium, it's not because I don't
15 have something to say. It's because I can't. I only get one
16 chance.

17 I want to -- I know that I have probably annoyed
18 some of you throughout this trial and that some of you
19 probably have things to say to me about -- about my skills as

20 an attorney.

21 I have two things to say to that. One is I'm happy

22 to hear them when the trial is over. But the second thing is

23 Mr. Scott didn't get to pick who his lawyer was. And it

24 wouldn't be fair if I have done something to annoy you or if

25 you have should criticism of my behavior to hold that against

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1 Mr. Scott. My job here is to try to present -- present facts
2 and information that's relevant to a very important decision
3 that you have to make, and if I just sat there and didn't do
4 anything it wouldn't be fair to you, and it wouldn't be fair
5 to Mr. Scott.

6 This has been a difficult situation, and I would
7 just say that if you remind yourself of why you are here and
8 what your job is and that it's not a popularity contest about
9 Mr. Scott or whether you approve of his lifestyle -- and
10 really what your job is is to look at the facts and apply the
11 law and attempt to reach a verdict that's an honest and
12 logical -- that results from an honest and logical discussion
13 about the facts and law, you can do the job, and you can
14 reach a verdict in this case that reflects truth and that
15 reflects justice, and that's a verdict of not guilty.

16 THE COURT: Ms. Blanch, your final summations.

17 MS. BLANCH: Thank you, Your Honor.

18 Ladies and gentlemen, Ms. Jacks is right about a
19 number of things.

20 First of all, justice is blind. She is absolutely
21 right. But you're not. And you have sworn an oath to look
22 at the evidence in this case. You must look at Exhibit 1,
23 Exhibit 2, Exhibit 3, Exhibit 4, 5, 6, and all the rest of
24 the evidence. And you must look at that evidence and
25 determine whether beyond a reasonable doubt this defendant

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1 conspired to violate RICO.

2 You're not allowed to look at him and hate him

3 because of his tattoos. Similarly, you are not allowed to

4 look at him and have sympathy for him because of who he is in

5 this situation. You are not allowed to vote not guilty

6 simply because you like Ms. Jacks.

7 You have to look at the evidence. And the evidence

8 is that Mr. Scott conspired with other members the Aryan

9 Brotherhood to operate a criminal organization within the

10 walls of prison, and as part of that criminal organization,

11 he agreed that people would die.

12 Now, I want to talk about the witnesses in this

13 case. She is right. They are convicted felons. They have

14 been in prison. And you don't have to like them. I don't

15 have to like them.

16 But the fact of the matter is you have heard

17 evidence that the Aryan Brotherhood is a secretive, closed

18 organization. How in the world would we get information

19 about what they do and what they are all about if we can't

20 talk to the members themselves, without talking to the people
21 who dropped out? And those are the people that you heard.
22 You don't have to like them. You don't have to
23 like their lifestyle. You don't have to like their tattoos.
24 But you have to look at their testimony and determine whether
25 they are credible. You have to look at whether they

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1 corroborate what each other says.

2 For example, with Benitez-Mendez, many of them told

3 you that Steve Scott admitted trying to kill Benitez-Mendez.

4 Some of them told you that T.D. Bingham, one of the leaders,

5 told you that he ordered that hit. Do the stories always

6 match up? Do they always agree with each other? No.

7 Now ask yourselves, if they were reading the

8 indictment and making up a story, wouldn't they do a better

9 job? Wouldn't their stories always match? In the real world

10 people hear things differently. They remember things

11 differently. In some cases, they're remembering things from

12 15 and 20 years ago.

13 So ask yourselves, if they were all lying to you,

14 each and every one of them, wouldn't they have done a better

15 job of getting their stories straight? And if they were

16 lying to you, how do you explain away the physical evidence?

17 the defendant's own words? Those exhibit don't lie.

18 With respect to Mr. -- the assault on Mr. Bond, you

19 heard Scott Cupples tell you that this defendant told him to

20 kill members of the D.C. Blacks all the way back at the
21 A.D.X. You heard that from Richard Bernard also that this
22 defendant at the A.D.X. ordered members of the Aryan
23 Brotherhood to kill members of the D.C. Blacks. And how do
24 you know they are telling the truth?
25 Look at the hit list that was found in his cell.

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1 Look at what he did with Irving Bond.

2 Now, there is some question about Mr. Cupples'
3 testimony that Patrick Mills got the information from
4 John Gotti on the rec yard and John Gotti told him -- well,
5 first of all, we don't know where Patrick Mills specifically
6 was housed. We know that at some point he was housed in a
7 cell where you couldn't look at the rec yard. We also know
8 that Springfield doesn't keep records of which cells inmates
9 are housed in, and we know that some cells on that unit look
10 over the rec yard. And we know that John Gotti rec'd in that
11 rec yard, and when he got there, he would be taken to and
12 from through the hallway where he would have had the
13 opportunity to sign to Scott Cupples and to Steve Scott.

14 If Scott Cupples was lying about his conversations
15 with Steve Scott, why bother to tell John Gotti? That's an
16 extraneous detail that is almost irrelevant except that it
17 tells you how things happened. If he was lying, why bother?

18 Instead, you have to look at this evidence in the
19 context of the whole. What was happening with the Aryan

20 Brotherhood at the time? What was going on? What was found
21 in his cell? What kites was he sending? This man said, "We
22 are at onsite war with the D.C. toads." And when he got in a
23 position at Springfield to do something about it, he did.
24 And that is what the evidence shows consistently, and it
25 corroborates what the witnesses said.

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1 In fact, Ms. Jacks talked about the Inmate Quarters
2 History regarding Gerald Kelly. She says he was a member of
3 the D.C. Blacks. He was on the hit list, and Steve Scott
4 didn't do anything about that. Remember that -- what Scott
5 Cupples told you?

6 Your memory governs, not mine and not Ms. Jacks.
7 But if you will recall, Scott Cupples testified that the
8 original plan brought to him by Steve Scott was to kill a
9 correctional officer because at that time the guards had
10 started to become more lax. Well, what does that tell you?
11 It tells you prior to that time the guards had not been so
12 lax, and he didn't have an opportunity to kill other people
13 on that cell.

14 And, if you'll recall, Scott Cupples testified that
15 part of the reason that Steve Scott wanted to kill the guard
16 was so he could get the keys and go up and down the tier and
17 kill not just Irving Bond but other enemies that were also on
18 that tier. We don't know specifically who those enemies
19 were. Could it have been Gerald Kelly? Not sure.

20 Ladies and gentlemen, justice is blind. You,
21 however, must look at the evidence. And when you go back in
22 the jury room, you have to decide who you believe. And you
23 don't have to like the Government's witnesses; they are
24 criminals. But you do have to listen to what they had to say
25 and decide whether you believe them, whether their stories

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1 are sufficiently consistent with the other evidence in this
2 case, his handwritten letters; the fact that people were, in
3 fact, stabbed.

4 And then you have to decide was the Aryan
5 Brotherhood a criminal enterprise and was Steve Scott a
6 member? That's part of what you have to decide.

7 Now, Ms. Jacks told you that simply being a member
8 of a gang is not enough to convict him. And she is right.
9 Just being a member of a gang is not enough. But if you find
10 that that gang is a criminal organization with criminal
11 goals, and that when he joined he said, "Yeah. Let's commit
12 those crimes," and he agreed that there would be drug
13 trafficking and he agreed that there would be murder, that is
14 enough.

15 And ladies and gentlemen, I submit to you that the
16 evidence has shown that the Aryan Brotherhood exists, it is
17 an ongoing criminal organization; that its goals include
18 crimes involving drug trafficking and involving murder; and
19 that when Steve Scott joined that organization, he had to

20 have raised his hand and said, "Yes, drug trafficking; yes,
21 murder."

22 And I submit that the evidence has shown all along
23 during his membership in the Aryan Brotherhood his behavior
24 has been consistent with that agreement. When the Aryan
25 Brotherhood told him to kill someone, he tried. When the

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1 Aryan Brotherhood told him to make weapons and to arm all of
2 the brothers, that's what he did. When the Aryan Brotherhood
3 told him, "We are at war with the D.C. Blacks," he made a hit
4 list, and he made sure that everyone else on the tier that he
5 could get in touch with knew who the enemies were and who
6 needed to be killed on site.

7 And ladies and gentlemen, that is enough. As long
8 as you believe that the Aryan Brotherhood is a criminal
9 organization and that when he joined he agreed that there
10 would be drug trafficking and there would be murders, at
11 least two of those things, and that the Aryan Brotherhood
12 effects interstate commerce by either using the mail or using
13 the telephone, using those people on the outside to forward
14 members back and forth, then I submit beyond a reasonable
15 doubt this defendant is guilty.

16 Thank you.

17 THE COURT: All right. Before you hear the
18 instructions, we will take a recess.

19 I would remind you of your duty not to converse or

20 otherwise communicate among yourselves or with anyone upon
21 any subject touching the merits of the cause on trial, and
22 you are not to form or to express any opinion in the case
23 until it's finally submitted to you for your verdict.
24 Now, as you -- as you go, you have not heard the --
25 the -- you have heard the arguments, but you have not heard

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1 the instructions of the Court; so we ask you not to make
2 any -- any determination of anything in terms of the facts
3 that have been presented to you possibly during the arguments
4 but not -- not with reference to its application to the -- to
5 the instructions which I will give you after the recess.

6 You are now excused until called. Court will
7 remain in session.

8 (The following was held out of the presence of the
9 jury.)

10 THE COURT: All right. Ten minutes.

11 THE CLERK: Court stands in recess for ten minutes.

12 (Brief recess.)

13 MS. WRIGHT: This United States District Court is
14 now in session.

15 THE COURT: Bring down the jury.

16 MS. JACKS: Your Honor, I have one objection. I
17 object to the general intent instruction. The specific --

18 THE COURT: I didn't hear you, ma'am.

19 MS. JACKS: I object to the general intent

20 instruction.

21 (The following was held in the presence of the

22 jury.)

23 THE COURT: The record will show the jurors are all

24 present and in their proper places. The defendant is present

25 with his counsel.

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1 Members of the jury, now that you have heard the
2 evidence and the arguments the lawyers, I must now instruct
3 you on the law that applies to this case. Your duty is to
4 find the facts from all the evidence allowed during the
5 trial.

6 To apply the law to the facts and to return a
7 verdict you must follow the law as I give it to you, whether
8 you agree with it or not.

9 You must not be influenced by any personal likes or
10 dislikes, opinions, prejudices or sympathies. You must
11 decide the case only on the evidence, as you promised to do
12 at beginning of the case.

13 All instructions are equally important; so you must
14 follow them all and not ignore any of them.

15 The indictment charges you -- charges a conspiracy
16 to violate the RICO laws. And you will have the
17 instruction -- the in indictment in the jury room with you so
18 that you can guide your deliberations by that as to what acts
19 are charged and whether or not the evidence does support

20 whatever acts are charged in the indictment.

21 An indictment is not evidence, and you are not to
22 consider it as any evidence. A defendant is presumed to be
23 innocent until every part the charges are proved against him
24 beyond a reasonable doubt. A defendant is not required to
25 prove he is innocent. If the Government fails to prove the

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1 charge, you must return a not guilty verdict.

2 A reasonable doubt is a doubt that is based upon
3 reason and common sense. Proof beyond a reasonable doubt is
4 proof that leaves you firmly convinced of a defendant's
5 guilt.

6 There are very few thing in the world that we know
7 with absolute certainty. And in criminal cases the law does
8 not require proof that overcomes every possible doubt.

9 You cannot convict on mere suspicion. If based
10 upon your consideration of all of the evidence you are firmly
11 convinced that the defendant is guilty of the crime charged,
12 you must find him guilty. If, on the other hand, you think
13 based upon reason and common sense that the Government has
14 not firmly convinced of the guilt of the defendant, you must
15 find him not guilty.

16 Evidence beyond a reasonable doubt is such proof
17 that a reasonable person in the use of reason and common
18 sense would be willing without hesitation to make the most
19 important decisions in his or her own life.

20 You have heard testimony that the defendant made --
21 made statements. It is for you to decide, one, whether the
22 defendant made the statement, and if so, how much weight to
23 give to it. In making those decisions, you must consider all
24 the evidence about the statement, including the circumstances
25 under which the witness may have made it.

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1 Count II is the count you are dealing with in the
2 indictment. Count II alleges that from an unknown date and
3 continuing until at least July 25th of 2002, within the
4 Central District of California and elsewhere, defendant
5 Steven Loren Scott, and there are -- and you will have in the
6 indictment the names of all those persons who are -- who are
7 indicted in this matter in Count II of the indictment -- that
8 Steven Loren Scott and others, known and unknown, unlawfully,
9 willfully, and knowingly combined, conspired, confederated,
10 and agreed, together and with each other to violate Title 18
11 United States Code Section 16 -- 1962C; that is, to conduct
12 and participate, directly and indirectly, in the conduct of
13 the affairs of the enterprise through a pattern of
14 racketeering activity consisting of multiple acts involving
15 murder in violation of various state laws, and distribution
16 of controlled substances, including heroin, methamphetamine,
17 and cocaine, Count II further alleges that the defendant was
18 associated with the Aryan Brotherhood criminal enterprise,
19 the activities of which affected interstate commerce, and

20 that the defendant agreed that a conspirator would commit at
21 least two acts of racketeering in the conduct of the affairs
22 of the enterprise.

23 Section 1962D of Title 18 of the United States Code
24 provides that it shall be unlawful for any person to
25 conspire, to violate any provisions of subsections A, B, or C

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1 of this section.

2 Section 1962C of the Title 18 of the United States
3 Code provides in part that it shall be unlawful for any
4 person employed by or associated with an enterprise engaged
5 in or activities of which affect interstate or foreign
6 commerce to conduct or participate, directly or indirectly,
7 in the conduct of such enterprise affairs through a pattern
8 of racketeering activity.

9 In order to convict the defendant on the RICO
10 conspiracy offense charged in Count II, the Government must
11 prove all of the following four elements beyond a reasonable
12 doubt.

13 First, that -- that an enterprise would be
14 established as alleged in the indictment;

15 second, that the enterprise or its activities would
16 affect interstate commerce;

17 third, that the defendant would be associated with
18 the enterprise;

19 fourth, that the defendant knowingly agreed to

20 conduct or participate directly or indirectly in the conduct
21 of the affairs of the charged enterprise through a pattern of
22 racketeering activity.
23 I will instruct you on the meaning of the terms
24 "enterprise," "affecting interstate commerce," "pattern of
25 racketeering activity," and "associated with the enterprise."

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1 To convict the defendant on the charge -- on the
2 charged RICO conspiracy offense in Count II, the Government
3 is not required to prove that the alleged enterprise was
4 actually established, that the defendant was actually
5 associated with the enterprise, or that the enterprise or
6 activities actually affected interstate commerce. Rather,
7 because the agreement to commit a RICO offense is the essence
8 of a RICO conspiracy offense, the Government need only prove
9 that if the conspiracy offense were completed as
10 contemplated, the enterprise would be established, that the
11 defendant would be associated with the enterprise, and that
12 the enterprise or its activities would affect interstate
13 commerce.

14 The defendant may be convicted of a RICO conspiracy
15 offense even if he did not personally participate in the
16 operation or management of the enterprise when the evidence
17 establishes that the defendant knowingly agreed to facilitate
18 a scheme which, if completed, would constitute a RICO
19 substantive violation involving at least one conspirator who

20 would participate in the operation or management of the
21 enterprise.

22 First, to prove the RICO conspiracy violation
23 charged in Count II, the Government must prove beyond a
24 reasonable doubt the existence of an enterprise. The
25 enterprise alleged in the indictment is the Aryan Brotherhood

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1 prison gang.

2 As used in these instructions, the term
3 "enterprise" includes any union or group of individuals
4 associated in fact, although not a legal entity. The term
5 "enterprise," as used in these instructions, may include a
6 group of people associated in fact, even though this
7 association is not recognized as a legal entity. Thus, an
8 enterprise need not be a formal business entity, such as a
9 corporation, but may be merely an informal association of
10 individuals. A group or association of people can be an
11 enterprise if these individuals have associated together with
12 a common purpose of engaging in a course of conduct.

13 Such an association of persons maybe established by
14 evidence showing an ongoing organization, formal or informal,
15 and by evidence that the people taking up the association
16 functioned as a continuing unit.

17 Therefore, in order to establish the existence of
18 such an enterprise, the Government must prove that there is
19 an ongoing organization -- ongoing organization with some

20 sort of framework for making or carrying out decisions.

21 Two, that the various members and associates of the

22 association functioned in a continuing unit to achieve a

23 common purpose.

24 And three, the enterprise is separate and apart to

25 make pattern of activity in which it engages, in other words,

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1 that it has separate existence of the pattern of racketeering
2 acts.

3 Regarding organization, it is not necessary that
4 the enterprise have a particular or formal structure, but it
5 must have sufficient organization, and its members functioned
6 and operated in a coordinated manner in order to carry out of
7 the alleged common purpose or purposes of the enterprise.
8 Continuing membership exists even where the membership
9 changes by adding or losing individuals during the course of
10 its existence.

11 Therefore, such an association of individuals may
12 retain its status as an enterprise even though the membership
13 association changes by adding or losing individuals during
14 the course of the existence -- of its existence.

15 Separate existence means that the enterprise has an
16 existence beyond that which is necessary merely to commit
17 each of the charged racketeering acts. That is, that the
18 organization continued to exist in the intervals between the
19 alleged racketeering activities.

20 It is not necessary, however, to find that the
21 enterprise had some function wholly unrelated to racket- --
22 to the racketeering activity. Common sense dictates that the
23 existence of an association in fact enterprise is oftentimes
24 more readily proven by what it does than by abstract analysis
25 of it's structure.

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1 Moreover, you may consider proof of the
2 racketeering acts to determine whether the evidence
3 establishes the existence of the charged enterprise. Thus,
4 evidence of the function of overseeing and coordinating the
5 commission of several different predicate racketeering acts
6 and other activities on an ongoing basis may satisfy the
7 separate existence of the enterprise requirement.

8 The second element that the Government must prove
9 beyond a reasonable doubt is that the enterprise or its
10 activities would affect interstate commerce. The Government
11 is not required to prove a significant or substantial effect
12 on interstate commerce; rather, a minimal effect on
13 interstate commerce is sufficient.

14 It is not necessary for the Government to prove
15 that the individual racketeering acts themselves affected
16 interstate commerce; rather, it is the enterprise and its
17 activities, considered in their entirety, that -- that must
18 be shown to have that effect.

19 On the other hand, this effect on interstate

20 commerce may be established through the effect caused by the
21 individual racketeering acts.

22 Moreover, it is not necessary for the Government to
23 prove that the defendant knew that the enterprise would
24 affect interstate commerce, that the defendant intended to
25 affect interstate commerce, or that the defendant's

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1 activities affected interstate commerce.

2 The Government contends that the enterprise in this
3 case affected interstate commerce in the following ways,
4 among others, through the use of interstate mail and through
5 the use of telephone facilities.

6 The Government must prove beyond a reasonable doubt
7 that the defendant would be associated with the enterprise.
8 "Associated with" should be given its plain meaning. As
9 stated in Webster's Third International Dictionary,
10 "associate" means "to join, often in a loose relationship as
11 a partner, fellow worker, colleague, friend, companion, or
12 ally to join or connect with one another. Therefore, it's a
13 person -- a person is associated with an enterprise when, for
14 example, he joins with other members of the enterprise and he
15 knowingly aids or furthers the activities of the enterprise
16 or he conducts business with or through the enterprise.

17 The agreement to -- to commit a RICO offense is the
18 essential aspect of a RICO conspiracy offense. You may find
19 that the defendant has entered into the requisite agreement

20 to violate RICO when the Government has proven beyond a
21 reasonable doubt that the defendant agreed with at least one
22 other co-conspirator that at least two racketeering acts
23 would be committed by a member of the conspiracy in the
24 conduct of the affairs of the enterprise.

25 The Government is not required to prove that the

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1 defendant personally committed two racketeering acts or that
2 he agreed to personally commit two racketeering acts.
3 Rather, the Government must prove beyond a reasonable doubt
4 that the defendant agreed to participate in the enterprise
5 with the knowledge and intent that at least one member of the
6 RICO conspiracy, which could be the defendant himself or some
7 other co-conspirator, would commit at least two predicate
8 racketeering acts in the conduct of the affairs of the
9 enterprise.

10 In addition, the indictment need not specify the
11 predicate racketeering acts that the defendant agreed would
12 be committed by some member of the conspiracy in the conduct
13 of the affairs of the enterprise.

14 You may consider evidence presented of racketeering
15 acts committed or agreed to be committed by any
16 co-conspirator in furtherance of the enterprise's affairs to
17 determine whether the defendant agreed at least -- that at
18 least one member the conspiracy would commit two or more
19 racketeering acts.

20 Moreover, in order to convict the defendant of the
21 RICO conspiracy offense, your verdict must be unanimous as to
22 which type or types of predicate racketeering activity the
23 defendant agreed would be committed. For example, at least
24 two acts of murder, attempted murder, or drug trafficking, or
25 one of each, or any combination thereof.

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1 Furthermore, to establish the requisite
2 conspiratorial agreement, the Government is not required to
3 prove that each co-conspirator explicitly agreed with every
4 other co-conspirator to commit the substantive RICO offense
5 or knew -- know all these fellow co-conspirators or was aware
6 of all of the details of the conspiracy. Rather, to
7 establish sufficient knowledge, it is only required that the
8 defendant know the general nature and common purpose of the
9 conspiracy and that the conspiracy extends beyond his
10 individual role.

11 Moreover, the elements of a RICO conspiracy such as
12 the co-conspirator -- the conspiratorial agreement, the
13 defendant's knowledge of it, and the defendant's
14 participation in the conspiracy may be inferred from
15 circumstantial evidence.

16 For example, if the evidence established that the
17 defendant and at least one other conspirator committed
18 several racketeering acts in furtherance of the charged
19 enterprise's affairs, you may infer the existence of the

20 requisite agreement to commit a RICO offense. However, it is
21 for you to determine whether, based upon the entirety of the
22 evidence, the Government has proven that the defendant has
23 entered into the required conspiratorial agreement.

24 Furthermore, it is not necessary that the
25 Government prove that the defendant was a member of the

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1 conspiracy from its beginning. Different persons may become
2 members of the conspiracy at different times.

3 To convict the defendant on -- on the charge --
4 charged RICO conspiracy in Count II, the Government is not
5 required to prove that the defendant partic- -- personally
6 participated in the operation or management of the
7 enterprise. Rather, a defendant may be convicted of a RICO
8 conspiracy offense even if he did not personally participate
9 in the operation or management when the evidence establishes
10 that the defendant knowingly agreed to -- to facilitate a
11 scheme which, if completed, would constitute a RICO
12 substantive violation involving at least one conspirator who
13 would participate in the operation of the management of the
14 enterprise.

15 Thus, the Government must prove that at least one
16 conspirator participated in the operation or management of
17 the enterprise itself, or at least one conspirator had some
18 part in directing the enterprise's affairs. Such proof may
19 include evidence of a conspirator intentionally performing

20 acts, functions, or duties which are necessary to or helpful
21 in the operation of the enterprise.
22 However, participation in the operation or
23 management of the enterprise does not require one to have
24 exercised a significant control over or within the
25 enterprise, or to have a formal position in the enterprise,

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1 or to have primary responsibility for the enterprise's

2 affairs.

3 The indictment alleges that the defendant and his

4 alleged co-conspirators conspired to violate Title 18 United

5 States Code 1962C; that is, to conduct and participate,

6 directly or indirectly, in the conduct of the affairs of the

7 enterprise through a pattern of racketeering activity

8 consisting of multiple acts involving murder -- multiple acts

9 involving murder, in violation of Illinois Criminal Code

10 Sections 8-2 and 9-1; Kansas Criminal Code Sections 21-3302

11 and 21-3401; the Missouri Revised Statutes, Sections 562.041

12 and 564.011 and 565.020; and distribution of controlled

13 substances, including heroin, methamphetamine, and cocaine,

14 in violation of Title 21 United States Code Sections 841A1,

15 843(b), and 846.

16 To convict the defendant on the charged RICO

17 conspiracy offense in Count II, the Government is not

18 required to prove that any defendant or any conspirator

19 actually committed, caused or aided and abetted any

20 racketeering act.

21 Moreover, it is not necessary in order to convict
22 the defendant of a charged conspiracy that the objectives or
23 purposes of the conspiracy, whatever they may be, have been
24 achieved or accomplished. The ultimate success or failure of
25 the conspiracy is irrelevant; rather, the conspiratorial

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1 agreement to commit a RICO offense is the essential aspect of
2 a RICO conspiracy offense.

3 To establish a pattern of RICO activity as alleged
4 in Count II of the indictment, the Government must prove
5 three elements beyond a reasonable doubt.

6 The defendant agreed to the commission of at least
7 two acts of racketeering within ten years of each other by
8 either the defendant or by a conspirator;

9 two, the racketeering acts are related; that is,
10 have the same or similar purposes, results, participants,
11 victim, or methods of commission, or be otherwise
12 interrelated by distinguishing characteristics and not be
13 merely isolated events. Two racketeering acts may be related
14 even though they are dissimilar or not directly related to
15 each other, provided that the racketeering acts are related
16 to the same enterprise.

17 For example, the requisite relationship between the
18 RICO enterprise and a predicate racketeering act may be
19 established by evidence that the -- that the defendant was

20 enabled to commit the racketeering act solely by virtue of
21 his position in the enterprise or involvement or control over
22 its affairs or by evidence that the racketeering act
23 benefited the enterprise or involvement in or control over
24 the -- its affairs, or by evidence that the racketeering act
25 benefited the enterprise or by evidence that the racketeering

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1 act promoted or furthered the purpose of the enterprise.

2 The racketeering acts themselves, either extended
3 over a substantial period of time or they pose a threat of
4 continued criminal activity, the Government need not prove
5 such a threat of continuity by any mathematical formula or by
6 any particular method of proof; but rather may prove it by a
7 variety of ways.

8 For example, the threat of continued unlawful
9 activity may be established when the evidence shows the
10 racketeering acts are part of a long-term association that
11 exists for criminal purposes, or when the racketeering acts
12 are shown to be the regular way of conducting the affairs of
13 the enterprise.

14 The indictment alleges that the act -- that the
15 racketeering activity consists of multiple acts involving
16 murder, in violation of Colorado Criminal Code, Illinois
17 Criminal Code, Kansas Criminal Code, and Missouri Criminal
18 Code.

19 And -- and also the distribution of controlled

20 substances, including heroin, methamphetamine, and cocaine,
21 in violation of Title 21 United States Code Sections 841A1,
22 843B, and 846.

23 In order to find -- this is with reference to
24 Colorado.

25 In order to find that this racketeering activity

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1 was committed, the Government must prove the following
2 essential elements beyond a reasonable doubt. That a member
3 or members of the conspiracy caused the death of a victim and
4 that the member or members of the conspiracy did so after
5 deliberation with the intent to cause the death of the victim
6 or another person.

7 "After deliberation" means not only intentionally,
8 but also the decision to commit the act was made after the
9 exercise of reflection and judgment concerning the act. An
10 act committed after deliberation is never one which has been
11 committed in a hasty or impulsive manner.

12 Question of conspiracy of murder in Colorado.

13 In order to find that this racketeering activity
14 was committed, the Government must prove the following
15 essentially elements beyond a reasonable doubt.

16 One, that a member or members of the conspiracy
17 agrees to the commission of the murder with the intent to
18 promote or facilitate its commission; and

19 two, that a member or members of the conspiracy

20 commit an overt act in pursuance of the murder.

21 "Overt act" means any act knowingly committed by

22 one of the conspirators in an effort to effect or accomplish

23 some object or purpose of the conspiracy. The overt act need

24 not be criminal in nature. If conspired separately and apart

25 from the conspiracy; it must, however, be an act which

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1 follows and tends toward accomplishment of a plan or scheme
2 and must be knowingly done in furtherance of some object or
3 purpose of the conspiracy charged in the indictment.

4 Murder in Illinois. In order to find that the
5 racketeering activity was committed, the Government must
6 prove the following essential elements beyond a reasonable
7 doubt.

8 One, that a member or members of the conspiracy
9 caused the death of the victim; and

10 two, that the member or members of the conspiracy
11 either, A, intended to kill or do great bodily
12 harm to the victim or another individual; or, B, knows that
13 such acts will cause death to the victim or another
14 individual; or, C, knows that such acts create a strong
15 probability of death or great bodily harm to the victim or
16 another individual.

17 In order to find the racketeering activity was
18 committed, the Government must prove the following essential
19 elements beyond a reasonable doubt.

20 That a member or members of the conspiracy agrees
21 to the commission of the murder with the intent that the
22 murder be committed; and
23 two, that a member or members of the conspiracy
24 commit an act in furtherance of the murder.
25 An agreement may be implied from the conduct of the

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1 parties, although they acted separately or by different means
2 and did not come together or enter into an expressed
3 agreement.

4 The murders in Kansas. One, that a member or
5 members of the conspiracy killed a victim; and, two, that the
6 member or members of the conspiracy did so intentionally and
7 with premeditation.

8 "Premeditation" means to have thought over the
9 matter beforehand.

10 In order to find that this racketeering activity
11 was committed, the Government must prove the following
12 essential elements beyond a reasonable doubt.

13 One, that a member or members of the conspiracy
14 agreed with one another person to commit the murder or to
15 assist in committing the murder; and

16 two, a member or members of the conspiracy
17 committed an overt act in furtherance the conspiracy.

18 A "conspiracy" is an agreement with other persons
19 to commit a crime or to assist in committing a crime followed

20 by an act in furtherance of the agreement. The agreement may
21 be established by any -- in any manner sufficient to show
22 understanding. It may be oral or written or inferred from
23 all of the facts and circumstances.

24 An act in furtherance of an agreement is an act
25 knowingly committed by a member of the conspiracy in an

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1 effort to effect or accomplish the object of the conspiracy.

2 The act itself need not be criminal in nature. It must,

3 however, be an act which follows and tends toward the

4 accomplishment of the object of the conspiracy.

5 The act may be committed by a conspirator alone.

6 It is not necessarily that other conspirators be present when

7 the act is committed. Proof of only one such act is

8 sufficient.

9 Murder in Missouri. In order to find that this

10 racketeering activity was committed, the Government must

11 prove beyond a reasonable doubt that a member or members of

12 the conspiracy knowingly caused the death of -- of the

13 victim; and, two, that the member or members of the

14 conspiracy did so after deliberation upon the matter.

15 Deliberation for purposes of first degree murder

16 means cool reflection upon victim's death for some amount of

17 time, no matter how short.

18 In order to find that this racketeering activity

19 was committed, the Government must prove the following

20 essential elements beyond a reasonable doubt.

21 First, that a member or members of the conspiracy
22 agreed with each -- with -- with such person or persons that
23 they should commit murder with the purpose of promoting or
24 facilitating the murder;
25 two, that one member or members of the conspiracy

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1 committed at least one overt act in pursuance of the murder.

2 An "overt act" is an act which must be -- which
3 must accompany or follow the agreement and must be done in
4 furtherance of and designed to carry out the purpose or
5 object of the conspiracy.

6 There is no requirement that such act be a physical
7 one or be a substantial step in the commission of the murder.

8 To show a conspiracy, it is not necessary that
9 there be direct evidence of any explicit agreement between
10 two or more persons. The agreement can be established by
11 circumstantial evidence and need show no more than a tacit
12 understanding among the participants.

13 Multiple acts of distribution of controlled
14 substances, including heroin, methamphetamine, and cocaine,
15 in violation of Title 21 United States Code Section 841A1,
16 843B, and 846 include distribution of a controlled substance
17 and conspire -- conspiring to distribute a controlled
18 substance.

19 Distribute a con- -- distribute of heroin,

20 methamphetamine, and cocaine, as alleged in Count II of the
21 indictment contains several essential elements. In order to
22 find that one or more members of the conspiracy committed
23 this racketeering activity, the Government must prove the
24 following essential elements beyond a reasonable doubt.
25 A member or members of the conspiracy knowingly and

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1 intentionally distributed, transferred approximately the
2 controlled substance described in Count II of the indictment;
3 and
4 two mat the time of such distribution or transfer,
5 that the -- he knew that the substance distributed was
6 heroin, methamphetamine, or cocaine.

7 It is solely for you, however, to determine whether
8 or not the Government has proven beyond a reasonable doubt
9 that the defendant distributed, possessed with intent to
10 distribute, or possessed a substance which was heroin,
11 methamphetamine, or cocaine.

12 The term "to distribute" as used in those
13 instructions means to deliver or to transfer, to attempt to
14 deliver or transfer possession or control of something from
15 one person to another.

16 The term "to distribute" includes the sale of
17 something by one person to another.

18 In order to prove a conspiracy to distribute
19 heroin, methamphetamine, or cocaine, the Government must

20 prove the following elements beyond a reasonable doubt.

21 That there was an agreement between two or more

22 persons to engage in conduct that violates federal drug law;

23 second, that the defendant knew of the conspiracy;

24 and

25 third, that the defendant knowingly and voluntarily

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1 became a part of the conspiracy.

2 The law allows proof of a drug conspiracy by direct
3 or circumstantial evidence, and therefore you may consider
4 either in reaching your verdict.

5 Once it has been shown that a conspiracy exists,
6 the evidence need only establish a slight connection between
7 the defendant and the conspiracy to support conviction. For
8 example, a defendant need not have knowledge of all
9 co-conspirators or of the details of the conspiracy and need
10 be convicted despite having played only a minor part in the
11 overall conspiracy.

12 Proof of an overt act in furtherance of the
13 conspiracy is not required to sustain a drug conspiracy
14 conviction. Instead, the evidence is sufficient if it proves
15 these three elements that -- that is, that there was an
16 agreement to violate federal drug law, that the defendant
17 knew of the conspiracy, and that the defendant knowingly and
18 voluntarily became a part of the conspiracy.

19 Evidence of a defendant's membership in a gang, by

20 itself, is insufficient to establish that a person's guilt of

21 a crime or as a co-conspirator.

22 You have heard testimony that the witnesses

23 received benefits from the Government in this case, including

24 money, promises from -- from the Government that they will

25 not be charged or prosecuted for crimes, and promises from

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1 the Government to recommend lenient treatment in their own
2 cases.

3 You should examine such testimony with greater
4 caution than that of other witnesses. In evaluating that
5 testimony you should consider the intent to which it may have
6 been influenced by the receipt of benefits from the
7 Government.

8 You have heard from witnesses who have pleaded
9 guilty to a crime arising out of the same -- of the same
10 elements for which the defendant is on trial. This guilty
11 plea is not evidence against the defendant, and you may
12 consider it only in determining this witness' believability.
13 You should consider this witness' testimony with great
14 caution, giving it the weight you feel it deserves.

15 The parties have agreed that the testimony of
16 Mark Bezy, William Halpin, Brian Jett, Thomas Jones, and
17 Tom Smith would be -- would be, if called as a witness. You
18 should consider the testimony in the same way as it has been
19 given to you here in court; that is, the reading of the

20 testimony by stipulation.

21 The parties have agreed to certain facts that have
22 been stated to you. You should therefore treat those facts
23 as having been proved.

24 The evidence that you can use to reach your verdict
25 is the sworn testimony of the witnesses, all exhibits

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1 received in evidence, all facts you accept as judicially
2 noticed, all facts which have been agreed or stipulated, and
3 all presumption upon which I instruct you.

4 In considering evidence, you need not accept simply
5 the bald statements of a witness. You can use your own
6 experience to draw your conclusions from the facts you find
7 have been proved.

8 Evidence may be either direct or circumstantial.
9 Direct evidence is direct proof of a fact, like eyewitness
10 testimony or the contents of a document. Circumstantial
11 evidence is proof of a chain of facts that leads to the
12 conclusion that some act has been committed or leads to
13 another fact. In law, there is no difference. You may use
14 both in determining the facts of this -- in this case.

15 A trial does not require that the prosecution call
16 every possible witness to an event or to produce everything
17 that may be mentioned during the trial. That often could be
18 time consuming and of no real value. You can consider the
19 failure to produce witnesses or evidence if you feel it is

20 necessary to your determination of the believability of a
21 witness or to meet the Government's burden of proof of every
22 element of the charge beyond a reasonable doubt.
23 "Knowingly" means that an act or failure to act
24 was done or omitted voluntarily or intentionally and not
25 because of accident, mistake or other innocent reason.

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1 "Willful" is a direct volition of the will to do an
2 act which the law forbids or to fail to do an act which the
3 law requires to be done. It is simply a deliberate act to
4 violate a law.

5 To determine the intent of a -- of a defendant, you
6 may use circumstantial evidence. Intent cannot ordinarily be
7 proved by direct evidence because there is no way of seeing
8 into the actual operation of a human mind. What a defendant
9 says or does and the circumstances surrounding an act or
10 statement is generally the best method of determining the
11 intent or knowledge of a defendant.

12 You should not confuse motive and intent. "Motive"
13 is why a person acts; "intent" is the state of mind with
14 which the act is done.

15 Personal advancement and financial gain are
16 recognized reason for peopling acting. These are a lot of
17 the motives that may prompt one person to acts of good,
18 another to acts of crime.

19 Good motive alone is never a defense to a crime.

20 You should consider motive only as a help to determine the
21 intent or knowledge of a defendant.

22 The law does not compel a defendant to testify, and
23 in the exercise of that Constitutional right, you may not
24 presume any guilt of a defendant, not even an inference of
25 guilt can be drawn -- can be drawn from the failure of a

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1 defendant to testify.

2 When you retire, you should select one your number
3 to act as your foreperson. That person will preside over
4 your deliberations and will be your spokesperson here in
5 court.

6 You will then discuss the case with your fellow
7 jurors to reach an agreement. Your verdict must be
8 unanimous. Each you must decide the case for yourself, but
9 you should do so only after you have considered all of the
10 evidence, discussed it fully with the other jurors, and
11 listened to the views of your fellow jurors. Don't be afraid
12 to change your opinion if the discussion persuades that you
13 that you should.

14 You decide, and don't just join the opinion of
15 another juror unless you can conscientiously agree.

16 It is important that you try to reach a unanimous
17 verdict, but only upon your conscientious -- conscientious
18 individual decision. Do not change an honest belief about
19 the weight and effect of evidence simply to reach a verdict.

20 In trying to reach a verdict, approach it as any
21 reasonable person would approach everyday decisions. Use
22 your good common sense, consider the evidence for only the
23 purposes for which it has been allowed, and give it a
24 reasonable and fair interpretation of your experience with
25 the natural tendencies and inclinations of human beings.

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1 If the defendant have been proved guilty beyond a
2 reasonable doubt, say so. If not proved guilty, say so.

3 Remember also that the question before you can
4 never be will the Government win or lose this case. Our
5 system of Government always wins when justice is done,
6 whether the verdict is guilty or not guilty.

7 In determining whether the Government has proved
8 the charges against the defendant, you should not and cannot
9 consider punishment. Punishment is my sole responsibility
10 and should not and cannot be considered by you in reaching an
11 impartial verdict.

12 We have prepared a formal verdict for your
13 convenience. And it reads in the title of the matter, first:
14 "We the jury in the above-entitled cause find the defendant,"
15 and then there is a blank, "guilty or not guilty as charged
16 in Count II of the First Superseding Indictment."

17 The foreperson of the jury puts in the unanimous
18 verdict either guilty or not guilty as charged in Count II of
19 the first superseding indictment.

20 As was explained in the jury instructions, in order
21 to convict the defendant of a RICO conspiracy offense charged
22 in Count II, you must find beyond a reasonable doubt that the
23 defendant agreed that two or more acts of racketeering
24 activity would be committed by some member or members of the
25 conspiracy, and you must be unanimous as to which type or

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1 types of racketeering activity that you found that the

2 defendant had agreed would be committed.

3 If you found the defendant guilty of Count II, you

4 are asked to identify which kind or kinds of racketeering

5 activity you unanimously found that the defendant agreed

6 would be committed.

7 And there is two acts involving murder. There is a

8 yes or no. Do you unanimously find that there were two acts

9 involving murder? Then you find that, and the foreperson of

10 the jury puts the unanimous verdict of the jury, either yes

11 or no.

12 Two acts involving drug trafficking. If you find

13 that there's proof -- been proof of two acts of drug

14 trafficking, the person -- the foreperson of the jury puts in

15 the yes or no in the -- in the verdict.

16 One act of each, yes or no. The foreperson puts in

17 the unanimous verdict of the jury.

18 If you unanimously found that defendant agreed that

19 acts involving murder would be committed, please identify

20 which acts involving murder you unanimously found that the
21 defendant agreed would be committed.

22 One, murder of Ismael Benitez-Mendez; murder of
23 Jimmy Lee Inman; murder of Frank Ruopoli; murder of the
24 Irving Bond; murder of Walter Johnson, Wakil; murder of
25 Walter Johnson, Butch Prince; conspiracy to murder a

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1 D.C. Black inmate, excluding Irving Bond and Walter Johnson,
2 Butch Prince; conspiracy to murder a second D.C. Black
3 inmate, excluding Irving Bond and Walter Johnson, Butch
4 Prince.

5 The foreperson of the jury puts in as each of those
6 yes or no. The foreperson of the -- person of the jury then
7 signs the verdict and the special verdicts with the date that
8 the verdict is returned and returns it here to court.

9 Counsel, approach the bench.

10 THE COURT: Any objection as given by the -- by the
11 Government?

12 MS. JACKS: Your Honor.

13 THE COURT: By the defendant.

14 MS. JACKS: As previously stated.

15 THE COURT: Let me caution you again that nothing I
16 have said in these instructions, nothing in the forms of
17 verdict that have been prepared for your use, no question of
18 mine, no admonition of mine to any counsel, no rulings that
19 have been made on any evidence is to suggest in any way what

20 verdict I think you should find. Whatever verdict you
21 return, it is your exclusive responsibility and should not be
22 he affected by any outside influence.

23 If you need to communicate with me about any
24 questions that you have, you can send me a note. You should
25 not attempt to communicate with me during deliberations

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1 except by a signed note, and remember you are not to tell

2 anyone how the jury stands, numerically or otherwise, until

3 you have reached a unanimous verdict.

4 Swear the bailiff.

5 THE CLERK: Would you bailiffs go to the lectern,

6 please.

7 Please state your names for the record.

8 BAILIFF NOBLE: The first is Dennis, D-e-n-n-i-s;

9 the last name is Noble, N-o-b-l-e.

10 BAILIFF PERCIVAL-WRIGHT: Janine Percival-Wright,

11 J-a-n-i-n-e P-e-r-c-i-v-a-l W-r-i-g-h-t.

12 THE CLERK: Please raise your right hand.

13 Do you solemnly swear that you will keep this jury

14 together in some private and convenient place; that you will

15 not permit any person to speak to or communicate with them

16 nor do so yourself unless by order of the Court or to ask

17 them if they have agreed upon a verdict or that you will

18 return them to court when they have so agreed or by so order

19 of the Court, so help you God.

20 BAILIFF NOBLE: I will.

21 BAILIFF PERCIVAL-WRIGHT: I will.

22 THE COURT: All right. The members of the jury

23 will retire except Alternates 19, 49, 29, and 9, if you will

24 just remain in the courtroom. You will retire to consider

25 the verdict. We are going to send you to lunch together

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1 immediately so that you have lunch.

2 All right. You are excused.

3 (The following was held out of the presence of the
4 jury.)

5 THE COURT: I'm sorry. I had to address you by --
6 by numbers, but that's what we had to do in this case so that
7 there would be no problems arise in the case.

8 You -- I wanted to tell you that you performed a
9 significant public service in giving us your time, being
10 available to us. If anything happened to any of the jurors,
11 that you would have to then be seated and deliberate with the
12 jurors as they deliberate now.

13 I ask you not to talk about the case until the jury
14 has finally reached a verdict. If you wish to talk about the
15 case at that time you may do so, but nobody can force you to
16 talk about this case. So if anybody asks you any questions
17 about the case and you don't want to talk to them, you just
18 walk away from them. If they insist on talking to you and
19 you don't want to talk to them, you just go to a phone, call

20 (2130 894-5267, and we will take care the matter for you so

21 that you won't have to talk to those people.

22 You are now excused with our thanks until further

23 notice. Thank you, all four of you.

24 (Whereupon, the alternate jurors leave the

25 courtroom.)

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1 THE COURT: We will be in recess in this matter
2 until called by the jury.

3 MS. WRIGHT: This court stands in recess.

4 (Luncheon recess taken.)

5 (Jury deliberating.)

6 THE CLERK: This United States District Court is
7 now in session. The Honorable Manuel L. Real presiding.

8 THE COURT: Bring down the jury. I'm going to send
9 them home. 4:50 p.m. We are going to send the jury home.

10 (The following was held in the presence of the
11 jury.)

12 THE COURT: The record should reflect the jurors
13 are in their proper places and the defendant present with his
14 counsel.

15 I'm going to send you home for the evening, and I
16 ask you just not to think about this case and to come back
17 tomorrow morning at 10:00 o'clock. And I would ask you to
18 not to start any deliberations until all of you are together
19 so that you can put your collective minds to the testimony

20 and the evidence which you have to consider.

21 You are now excused until 10:00 o'clock tomorrow

22 morning. The jury is excused. Court will remain in session.

23 THE CLERK: Court stands in recess.

24 (The following was held out of the presence of the

25 jury.)

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1 THE COURT: 10:00 o'clock tomorrow morning.

2 (Whereupon, Court was adjourned at 10:13 a.m.

3 until 10:00 a.m. on Thursday, October 5, 2006.)

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C E R T I F I C A T E

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6 I hereby certify that the foregoing matter is transcribed

7 from the stenographic notes taken by me and is a true and

8 accurate transcription of the same.

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SHERI S. KLEEGER, CSR
DATED: FEBRUARY 21, 2007
Official Court Reporter
License No. 10340.

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UNITED STATES DISTRICT COURT